

1-1-1996

# Star Wars: Film Permitting, Prior Restraint and Government's Role in the Entertainment Industry

Jon M. Garon

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# LOYOLA OF LOS ANGELES ENTERTAINMENT LAW JOURNAL

VOLUME SEVENTEEN

1996

NUMBER 1

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by *Jon Garon*.....1

A substantial industry has developed involving the highly lucrative business of on-location filming. This business includes not only motion pictures and television, but also still photography, commercials, industrials, and the growing area of computer multimedia. The industrial growth has generated \$16 billion in annual revenue for state and local governments. As a result, local government officials are called upon to rewrite film permit laws that will enable its jurisdiction to remain competitive for shooting engagements. The film industry must be regulated in a manner that will promote public safety for local communities while recognizing the limitations set forth by the First Amendment on the rights of filmmakers. Because films are considered a form of speech under the First Amendment, local ordinances that regulate film production must be carefully drafted to avoid creating any undue prior restraint on filming, nor vest any unconstitutionally vague or arbitrary licensing authority in the local government staff. This Article provides an historical and economic overview of the entertainment industry. The Article also addresses the constitutional implications of filming regulations and provides a legal framework that will meet the economic and regulatory needs of the community while respecting the First Amendment protections of filmmakers. Finally, the author proposes a theoretical framework and viable model for future development of filming regulations.

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works produced under the original grant are exempt from this clause. This Article argues that derivative works, such as those produced by museum gift shops, which generally lack independent artistic value, should not be exempt from the termination clause of the Copyright Act. The policies underlying copyright law and its related doctrines support the concept that an artist's economic interest in his/her work should be protected in this way.

## NOTES & COMMENTS

NO RUNS, NO HITS, TWO ERRORS:

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*Major league baseball and labor strife* have become synonymous terms. Every collective bargaining negotiation between players and owners over the last twenty-five years has resulted in a strike or a lock-out. The 1994 baseball strike caused cancellation of the World Series and introduced the threat of using replacement players. Seeking to bench replacement personnel, the Maryland General Assembly enacted Financial Institutions Section 13-723 of the Maryland Code, which prohibited the use of replacement players in Oriole Park at Camden Yards. This Comment argues that the Maryland statute is unconstitutional, in that it is preempted by the National Labor Relations Act, and in conflict with the Contract Clause of the U.S. Constitution.

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The Indian Gaming Regulatory Act ("IGRA") was enacted to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." IGRA has been the source of substantial litigation since its enactment in 1988. Most disputes between the states and the tribes arise in regards to the negotiation of Tribal-State compacts for the operation of Class III gaming. This Comment analyzes the Tenth and Eleventh Amendment challenges to the constitutionality of IGRA. Additionally, this Comment analyzes the split between the Second and Ninth Circuit Courts of Appeals' interpretations of whether a state permits such gaming for purposes of Tribal-State compact negotiations. This Comment concludes that Congress intended to give Indian tribes the opportunity to conduct most forms of gaming, and therefore the states' challenges to IGRA are unnecessarily, and in many cases, unfairly prohibiting the tribes from the inevitable—operating Class III games.

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"True crime stories" such as the tales of Tonya Harding or Amy Fisher are among today's hottest selling television shows, movies, and books. Although the thought of such unscrupulous characters making money by talking about their crimes is repugnant, it is a fact of life in today's mass communications "marketplace of ideas." This Note addresses the growing dispute among lower courts regarding the extent to which those convicted of a crime may be barred

from sharing their stories and, therefore, subjected to otherwise unconstitutional restrictions on fundamental rights. This Note specifically examines *Commonwealth v. Power* and explores whether a court-imposed condition of probation barring a convicted criminal from profiting from the sale of one's "story" is constitutionally permissible. This Note suggests that because judicial orders direct their commands toward particular individuals they carry great risks of censorship and discriminatory application. Similar to legislative action that implicates fundamental rights, judicial actions should be subject to exacting scrutiny to limit the risks of discriminatory application and properly to balance the interests at stake. Echoing the Supreme Court's reasoning in *Madsen v. Women's Health Center, Inc.*, an intermediate level of scrutiny should apply to probation conditions that jeopardize a probationer's First Amendment rights. Under this standard, the conditions imposed on Katherine Ann Power would not survive judicial scrutiny.

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# Star Wars: Film Permitting, Prior Restraint & Government's Role in the Entertainment Industry

*Jon Garon\**

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## I. INTRODUCTION

*The world's a stage, the stage is a world of entertainment!*<sup>1</sup>

—Howard Deitz & Arthur Schwartz

*If you have built castles in the air, your work need not be lost; that is where they should be. Now put the foundations under them.*<sup>2</sup>

—Henry David Thoreau

In the plush offices of Studio City and in the trenches of Hollywood, a war rages on for control of billions of dollars. Money generated through licensing fees, location rentals, payroll, and equipment purchase and rental in each film and television location pour into the local economy. With the direct effect of motion picture and television spending being estimated at fifteen billion dollars per year in the Los Angeles County area,<sup>3</sup> other city, county, and state governments from Florida to Minnesota are actively engaged in the battle to gain a foothold in this twenty-first century gold rush. Los Angeles feels increasingly under attack from other jurisdictions, and has begun to fight to maintain its hold on the market. The tactics used, of course, are pure “show biz.”<sup>4</sup>

Using free gifts of T-shirts and hot dogs as enticement to their booth outside the Location Expo convention, the Los Angeles City and County film offices used Hollywood glitz to steal center stage. Los Angeles used the booth to impress upon Hollywood-based studios and production

1. HOWARD DEITZ & ARTHUR SCHWARTZ, *THAT'S ENTERTAINMENT* (1953).

2. HENRY DAVID THOREAU, *WALDEN* 215 (1854).

3. THE PUBLIC AFFAIRS COALITION OF THE ALLIANCE OF MOTION PICTURE & TELEVISION PRODUCERS, *THE ECONOMIC IMPACT OF MOTION PICTURE, TELEVISION & COMMERCIAL PRODUCTION IN CALIFORNIA 19* (1994) [hereinafter *ALLIANCE STUDY*]. See *infra* note 28 and accompanying text for a description of this report.

4. Steve Ginsburg, *L.A. City, County Vie Openly with Other Regions for Film Location Work*, L.A. BUS. J., Mar. 7, 1994, at N7.

Film offices of the City and County of Los Angeles pitched a tent in front of the Santa Monica Superior Court House and attracted about 5,000 location managers and studio executives to hear their arguments about why they should shoot their productions here and not go elsewhere.

Runaway film production is a threat to Los Angeles' economy and Location Expo underscored the problem. The show attracted 187 film commissions from around the world, which set up booths inside the auditorium to woo Los Angeles-based entertainment companies to their locations with incentive packages that include outright cash giveaways.



companies that they should consider their hometown before looking at what the competition has to offer.<sup>5</sup>

While Los Angeles battles to keep production at home, other cities, states, and countries attempt to attract more. All of these jurisdictions have the same problem of competing with local neighborhood groups fighting to keep the film companies out of their backyards, driveways, beaches, and neighborhoods.<sup>6</sup> Local governments strive to balance local safety and other community concerns with the economic opportunities that the multibillion dollar industry can bring.

This Article reviews the competition fostered by the jurisdictional battle for market share within the motion picture, television, and allied industries. This part reviews the economic and legal framework in which the competition is waged, with special focus on the constitutional ramifications of regulating an industry engaged in the commerce of marketing protected speech. The burden local government places on the First Amendment rights of filmmakers is assessed within the framework of regulations that control the conduct of speakers. This Article also focuses on those regulations that go to the content of the film, and re-assesses the model legislation suggested by the California legislature in light of the constitutional requirements.

Part II of this Article surveys the economic impact of the entertainment industry and the attempts being made by film commissions throughout the United States and Canada to increase production and revenues for their local jurisdictions. This section reviews the types of media involved in on-location film production, outlining the differing needs of each medium. By providing a historical perspective, it also describes the attempts in California, New York, Florida, and Canada to attract new production while retaining existing work.

Part III reviews the legal restrictions and policy considerations that must be taken into account in fashioning film permit ordinances. The author addresses the significant First Amendment issues that arise and argues that film is a form of protected speech, both when exhibited and when produced. As a result, the film permit ordinance, by its very nature, constitutes a prior restraint, necessitating carefully drawn regulation. Content restrictions, incidental burdens, and the access to public forums for

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5. *Id.*

6. *E.g.*, Ted Johnson, '90210' Crew: *Return To Sender*, L.A. TIMES, July 29, 1993, at F1 (Hermosa Beach residents suing to block filming and displayed banners from boats to block ocean scenery); Tom Lowry, *City Film-Flammed: Residents Riled by Deals with Movie Makers*, N.Y. DAILY NEWS, May 5, 1993, at 5 (*Carlito's Way* disrupting New York's East Village, eliminating parking while simulating rain and turning midnight into daylight with floodlights).

unpopular opinions are all detailed within the context of film production. This section also details the governmental policies of public safety, community convenience, and economic expansion that underlie the purpose behind the film permit ordinance and state statutes, delineating the balance between the interests of local communities and the rights of the filmmaker in fashioning constitutional regulation.

Part IV analyzes the impact such regulations have on the production companies and suggests methods for further simplifying the production process. This section integrates the constitutional requirements for proper regulation into a streamlined but effective set of provisions that will serve the needs of both the community and the industry by protecting public safety, minimizing the inconvenience to the community and maximizing the economic opportunities. The author reviews this outline against the backdrop of the model suggested by the California legislature, and recommends modifications necessary to make the legislation constitutionally sound.

Although this Article does not endorse any state's proprietary interest in film production, much of the economic data has been generated as part of the competition between Hollywood and the rest of the country for film dollars.

## II. ECONOMIC OVERVIEW OF THE ENTERTAINMENT INDUSTRY

### *A. Economic Impact of the Motion Picture and Entertainment Industry*

Unlike most segments of the economy, the motion picture industry has experienced a full-scale explosion of growth in jobs and revenue throughout this decade. In the ten-month period from October 1994 through July 1995, entertainment-related employment increased by twenty percent.<sup>7</sup> This estimate may, in fact, be low because much of the work is done through independent contractors, who are more difficult to track.<sup>8</sup> Nor is job growth the only economic indicator of success. The Census Bureau has tracked significant growth in the revenue of theatrical exhibitors, which has seen box office receipts increase to a forecasted \$5.25 billion in 1994, up approximately 3% from 1993 and 7.6% from 1992 to 1994.<sup>9</sup> Foreign revenues for box office receipts added \$6.6 billion to the

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7. Thomas T. Vogel Jr., *There's No Stimulus Like Show Business—As Production Booms, States Want to Get into the Act*, WALL ST. J., Sept. 22, 1995, at A2.

8. *Id.*

9. U.S. DEPARTMENT OF COMMERCE: INTERNATIONAL TRADE ADMINISTRATION AND

industry coffers in 1992.<sup>10</sup> This modest growth, however, is dwarfed by the income generated from the videotape and cable industries. The cable industry generated an estimated \$28.8 billion in revenue for 1994<sup>11</sup> while videotape sales and rentals add an additional revenue estimated to be anywhere from \$14 to \$19 billion for 1994.<sup>12</sup> The *Wall Street Journal* cites the investment bank Veronis, Suhler & Associates as predicting that the combined income from box office, television, cable, and video will increase by almost \$10 billion in the next five years for domestic revenue. This estimate does not include non-broadcast revenue generated from cable, such as installation fees, equipment rental, and other similar charges.<sup>13</sup>

For California, this growth constitutes one of the few positive economic indicators in years. The *Los Angeles Times* states that the motion picture and related industries are among the few sectors of the California economy that have been steadily growing over the past five years.<sup>14</sup> While aerospace and real estate have suffered significantly during recent economic downturns, the film industry has continued to expand, becoming one of the fastest growing segments in the California economy.<sup>15</sup>

The economic impact goes far beyond the back lots of Hollywood's major studios. The growth of the entertainment industry at a time of increasing economic shrinkage has resulted in some innovative new projects. The United States Department of Defense ("DoD") has even joined in the act. For example, in 1994, the DoD leased the Treasure Island Naval Station in San Francisco for use as a sound stage.<sup>16</sup> This facility provided the additional convenience of a sound stage for the prime outdoor locations and landscapes of the San Francisco Bay area. It also allowed the city to keep a production company on site that would otherwise only shoot exteriors and then move to Los Angeles for interior locations.<sup>17</sup> The lease is one of many alternatives designed to expand the possible uses for base

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BUREAU OF CENSUS, U.S. INDUSTRIAL OUTLOOK 1994 31-1 (1995) [hereinafter U.S. INDUSTRIAL OUTLOOK].

10. *Id.* at 31-2.

11. *Id.* at 31-6.

12. *Id.* at 31-1.

13. Vogel, *supra* note 7, at A2.

14. James F. Peltz, *The California Economy Sputtering Ahead: Houses Sit. Bases Close. Storms Rage. But Movie Making and Tourism, Crop Exports and Technology Are Driving the State Forward.*, L.A. TIMES, July 23, 1995, at D1.

15. *Id.*

16. *S.F. Given Film Studio Space*, SACRAMENTO BEE, Mar. 29, 1994, at B3.

17. Nicholas Pasquariello, *Reel Duty: Turning Military Facilities into Sound Stages*, LOCATIONS, Feb.-Apr. 1995, at 54.

facilities as the federal government continues to close bases and downsize. The use of these facilities for filming will return some of the economic benefit of the base to the local community.<sup>18</sup>

Military bases serve as excellent locations for film production because both share many of the same needs. Both military activities and film productions require privacy from the local community, open areas where potentially dangerous activities can be undertaken with minimum risk, and large, open indoor spaces for equipment and activities. Airplane hangers convert into ideal sound stages because of the large, unrestricted open space. In addition, these facilities allow the production company to house all production personnel in the same office so that logistic and creative decisions may be made more efficiently.<sup>19</sup> This arrangement maximizes the economic benefit while minimizing the military's role in the film activity.<sup>20</sup>

Film production also provides for excellent short-term or long-term use of other large facilities that have outlived their original purpose. The geodesic dome that formerly housed Howard Hughes' famous Spruce Goose recently has become a full-service production lot. It provides approximately 140,000 square feet without any beams or dividers. The dome is nearly five times the size of the largest indoor stage at Warner Brothers.<sup>21</sup> Warner Brothers leased this large, unbroken indoor space for \$500,000 to film the movie *Stargate* and an amount "considerably more than *Stargate's* fee" for the second Batman sequel, *Batman Forever*.<sup>22</sup>

Similarly, film productions such as *The Fan* generated revenue for Anaheim Stadium, former home of the Los Angeles Rams football team.<sup>23</sup> The film industry became an instant substitute for some of the revenue formerly generated by the ten National Football League games played annually in Anaheim Stadium.<sup>24</sup>

The growth and expansion of the entertainment industry has been a strong, positive economic indicator across the country. In Miami, film

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18. Robert Goldrich, *AFCI Cineposium Flags U.S. Base Access*, SHOOT, Oct. 7, 1994, at 1.

19. *Id.*

20. This arrangement circumvents many of the limitations imposed by the military when filming through an arrangement with the Department of Defense. See *infra* note 298 and accompanying text.

21. Edmund Newton, *Stealing the Scene: With its Beaches, Scenic Skyline, Queen Mary and Dome, Long Beach is Attracting More Movie Makers*, L.A. TIMES, Jan. 19, 1995, at J8.

22. Mark I. Pinsky, *Long Beach Dome Gets New Life in Film*, L.A. TIMES, Mar. 10, 1995, at F2.

23. Greg Hernandez, *Without Football, Big A Will Be a Star*, L.A. TIMES, Sept. 1, 1995, at C8.

24. *Id.*

revenue grew from \$1 million in 1977 to \$91 million in 1993, and it equaled the \$91 million amount in only the first six months of 1994.<sup>25</sup> The Illinois Film Office reports an average of \$50 million annually in revenue from feature films and television production.<sup>26</sup> In Iowa, the impact was even more remarkable. Iowa hosted both *Field of Dreams*, which accounts for 100,000 tourists coming to visit a baseball diamond hidden in the cornfield that was featured in the movie, and *Bridges of Madison County*, which has increased Iowa tourism by an additional twenty percent in one year.<sup>27</sup>

To assess the economic impact of motion picture and television production accurately, the Public Affairs Coalition of the Alliance of Motion Picture and Television Producers prepared an economic survey of the industry that was released in 1994.<sup>28</sup> Hailed as the first systematic review of the entertainment industry's economic impact, the survey reviewed the effect of the industry in terms of both direct payments to California through taxes and payroll as well as the indirect effect of the industry in the area.

The 1992 data<sup>29</sup> reflect that motion picture and television production form one of the largest California industries. There, the industry employs 348,000 people, has a payroll in excess of \$7.4 billion,<sup>30</sup> and spends an additional \$8.9 billion for related goods and services.<sup>31</sup> These figures reflect only the direct benefits of the industry in terms of full-time employees who work in one of the thousand or more film-related California businesses. When viewed in terms of the support companies and related organizations, employment within the industry swells to 534,000.<sup>32</sup> In this

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25. Felicia Levine, *Movie Biz Bucks up Big: Production Revenues for '94 About to Surpass All of 1993*, S. FLA. BUS. J., July 22, 1994, at 1.

26. Aaron Baar, *Trends in the Region: Hollywood in the Heartland*, BOND BUYER, July 19, 1995, at 28.

27. *Id.*

28. ALLIANCE STUDY, *supra* note 3. The report is a compilation of two separate studies, including a report focusing exclusively on production employment, payroll, taxes, and related tangible expenses prepared by the Monitor Company [hereinafter MONITOR REPORT]. A second study was added to the report to increase the validity of the report as well as expand the focus to include a broader base of economic impact. The second report was prepared by economist David Friedman [hereinafter FRIEDMAN REPORT]. Additional data was compiled in an executive summary [hereinafter EXECUTIVE SUMMARY]. ALLIANCE STUDY, *supra* note 3, at 4.

29. The most recent data available as of this publication.

30. MONITOR REPORT, *supra* note 28, at 6.

31. *Id.* at 15.

32. FRIEDMAN REPORT, *supra* note 28, at 4.

same period, production companies filming outside of California generated \$5.1 billion for the Canadian and U.S. economies.<sup>33</sup>

In addition, there is a significant economic benefit beyond direct spending. The Monitor Report identified additional areas where the industry has an economic impact that is less visible, but extremely significant.<sup>34</sup> Tourism systematically benefits from association with and visibility from the entertainment industry.<sup>35</sup> In Orange County, for example, Disneyland serves as a classic example of the synergy between film and tourism, generating significant revenue for Orange County. Universal Studios has had similar success with its movie-based rides, including King Kong, Backdraft, and Jurassic Park.<sup>36</sup> According to the Center for the Continuing Study of the California Economy, California tourism generated \$54 billion, created 733,000 jobs, and represented "one in every six travel dollars spent in the United States during 1991."<sup>37</sup>

Similar impact has been felt in Florida, home to Walt Disney World, Universal Studios, and MGM Studios. Florida will soon feature Universal's Islands of Adventure, a \$2 billion joint venture between MCA, the parent company of Universal, and the British film and entertainment company, Rank Organization PLC.<sup>38</sup>

The entertainment industry may also deserve credit for stimulating the current technological explosion. The "[d]emand for new media, special effects, enhanced sound and visual quality and new film techniques has always made the production industry a heavy user of novel technologies . . . ."<sup>39</sup> Evidence of this development comes from the growing relationship between the computer industry and the television and film industries. For example, the animated film *Toy Story* set a new standard as the first computer animated full-length film, generating large profits for Disney, the picture's producer and distributor. The film also helped launch the public offering of Pixar, Inc., the computer software company owned by Apple Computer co-founder Steve Jobs. In addition, Microsoft, the dominant supplier of PC computer operating software, has

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33. Goldrich, *supra* note 18, at 1.

34. See generally MONITOR REPORT, *supra* note 28.

35. FRIEDMAN REPORT, *supra* note 28, at 5-6.

36. *Id.* at 5.

37. *Id.*

38. Scheherazade Daneshkhu & Tony Jackson, *Theme Parks and Variations in Key of Profit: They're Growing in Size and Number Throughout the World as Investors Jump on the Merry-Go-Round*, FIN. POST, Aug. 18, 1995, at 1.

39. FRIEDMAN REPORT, *supra* note 28, at 6.

entered into a joint venture with NBC for a project that includes a twenty-four-hour cable news channel, an online news service, and other projects.<sup>40</sup>

This trend will expand the growth of the industry's economic importance, even as it fundamentally changes the industry. The digital technology revolution, illustrated by the explosive growth of the Internet and the increasing competition between cable and telecommunications companies for the television-signal delivery market, reflects the increasing influence of the entertainment industry in the U.S. economy. Steven Spielberg's next two directorial projects are expected to appear as CD-ROM video games rather than as motion pictures.<sup>41</sup> Telephone companies are undertaking a variety of technological experiments to provide cable television-type service into the home.<sup>42</sup> These new types of media will have essentially the same production needs for location filming as the more traditional media of television and film.

In addition to the growth of entertainment and development of new media opportunities, the Friedman Report describes an even more profound impact of the motion picture industry.

[M]any of the organizational changes, technical adaptations and business practices now commonplace in California's production industry represent the most sophisticated industrial and management technologies that have ever been developed in response to modern economic conditions. When the time comes to pick the industries that most fully dominate their global markets, and those that are most likely to foster new employment and business opportunities even in the most challenging environments, few, if any, sectors better fit the bill.<sup>43</sup>

In addition to the areas of tourism and new technology, the Alliance Study emphasized six areas that prosper from the entertainment industry. These include urban economic development,<sup>44</sup> advanced management

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40. J. Max Robins & Joe Flint, *Microsoft, NBC Interfacing, Online Services, Int'l Distribution Back Cable News Venture*, DAILY VARIETY (N.Y.), Dec. 15, 1995, at 7.

41. Albert Kim, *Hollywired: From Spielberg on CD-ROM to Shatner Online, Celebs All over Tinseltown Are Plugging into Multimedia*, ENT. WKLY., Oct. 13, 1995, at 20. The two projects are slated to be *The Dig*, "an epic sci-fi adventure about a team of astronauts stranded on an alien planet," and *MovieMaker*, starring Quentin Tarantino and *Friends'* Jennifer Aniston. *Id.*

42. Ron Chebra, *Utilities, Partners Mix Media to Deliver Message*, ELECTRICAL WORLD, Nov. 1995, at 35.

43. FRIEDMAN REPORT, *supra* note 28, at 5.

44. *Id.*

Perhaps the most striking feature of the production industry is that it has thrived—generating employment growth and high-wage, high value-added jobs even during

innovations,<sup>45</sup> international trade,<sup>46</sup> architecture/environmental planning,<sup>47</sup> product image development and retail activities,<sup>48</sup> and new roles for labor unions.<sup>49</sup> The implications of the entertainment industry to the broader industrial infrastructure cannot be readily quantified, but as the Monitor Report indicates, the effects can be far reaching. The industry generates billions of dollars in direct revenue and is a vital component supporting the development of new technology and urban growth. Thus, the industry's importance cannot be understated. The stakes are very high for Hollywood and the other areas looking to expand or attract new motion picture production business.

### *B. Industry Overview*

The billions of dollars funneled by the entertainment industry into local economies are spent in modest increments through on-location

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the current recession—in the heart of California's most troubled urban regions . . . . Urban economic development is a critical challenge for California, and the production industry is a vital, if presently under-appreciated resource for fashioning private and public sector initiatives in that area.

*Id.*

45. *Id.* at 6 ("As requirements for creative, high-quality, timely products and services have steadily intensified, many firms at all levels of the production industry have created management tools that permit remarkable efficiencies that can enrich other sectors.").

46. *Id.* at 7

The entertainment industry's considerable international strength has put it at the forefront of efforts to improve access to foreign markets, and to improve copyright and intellectual property protection throughout the world. . . . The production industry also represents exactly the kind of strong, regionally focused sector that California, if not the country, will have to foster to survive in an increasingly global economy. Some overseas production companies, in fact, have had to open California offices just to stay in touch with the leading-edge technologies and creativity the state's industry sustains. At the same time, California firms that have expanded to London, Mexico City or Tokyo often report that their branch offices do not take away from their business in the state, but rather attract more work, as talented foreign producers and directors learn more about the capabilities the region has to offer.

*Id.*

47. *Id.* at 8 ("Architectural firms, cities and developers are increasingly attracted by the industry's lighting and other display technology as they seek to enhance the appeal of their buildings and environments.").

48. *Id.* ("Beyond such lucrative commercial and retailing undertakings [of product spin-offs like toys and clothes], the production industry has also become involved in product image development—the crux of any advertising campaign—and the reinventing of retail environments in ways that could lead to enormous business opportunities . . .").

49. FRIEDMAN REPORT, *supra* note 28, at 9 ("[Y]et, unlike many other industries, production unions have not been generally displaced. Entertainment unions, in fact, have adjusted to the new economic realities far more flexibly than in other areas, and in many ways serve as a model for what the labor movement can become in the face of volatile global markets.").



productions and the rare, but spectacular, creation of production studios. Such studios consist of permanent production offices, production shops for creating sets and costumes, and sound stages where filming can take place in a controlled environment.

### 1. The Studio Production

Studios may also have outdoor back lots where semi-permanent sets are left standing for use in various productions on a regular basis. The term "studio" represents both the dominant corporations in the motion picture industry as well as the physical structures those companies utilize to create the film product. Studios may mean "the larger, fully integrated production, distribution and marketing companies,"<sup>50</sup> as well as the sound-stages, back lots, offices, and editing rooms such companies control.

Despite the extreme expense associated with developing major motion picture studios, plans have been announced for the first new major studio in Southern California in forty years.<sup>51</sup> DreamWorks SKG, the creation of entertainment industry giants Steven Spielberg, Jeffrey Katzenberg, and David Geffen, announced plans for a 100-acre studio in Playa Vista located in West Los Angeles.<sup>52</sup> The cost of construction is estimated at \$750 million. The studio will include "a main headquarters with a movie theater and commissary, separate producer/talent bungalows built around an eight-acre manmade lake and fifteen movie and television sound stages, among other things."<sup>53</sup> The studio itself is only part of a large complex that spans an estimated 1087 acres of land, 13,000 homes, 260 acres of preserved wetlands, and a community infrastructure including schools, stores, parks, and restaurants at an estimated cost of \$7 billion.<sup>54</sup> The project received governmental blessing and incentives, with the City of Los Angeles providing \$70 million in tax benefits<sup>55</sup> and \$30 million in scarce Metropolitan Transit Authority improvements.<sup>56</sup> The new studio/city will also boast state-of-the-art telecommunications equipment.<sup>57</sup>

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50. MONITOR REPORT, *supra* note 28, at 9.

51. Antonio A. Prado, *Far West Bond Watch*, BOND BUYER, Dec. 2, 1995, at 11.

52. Claudia Eller, *DreamWorks Plans Its Dream Factory*, L.A. TIMES, Dec. 15, 1995, at D4.

53. *Id.*

54. *Id.*

55. Prado, *supra* note 51, at 11.

56. David Bloom, *Subway Line in Valley Loses Funds*, L.A. DAILY NEWS, Dec. 21, 1995, at N1.

57. *DreamWorks Settles on Playa Vista as the Location for Its \$750M Movie Studio Complex*, COMPUTERGRAM INT'L, Dec. 20, 1995, available in 1995 WL 13694888 (The new

On a more modest scale, the Economic Development Commission of Mid-Florida has been working on the development of Sun Studios, a new production facility in Seminole County, Florida. It hopes to capitalize on the growing Florida film production industry and expand the industry's reach into other areas of the State's economy. The project is estimated to cost \$220 million for facility and equipment expenses, excluding real estate.<sup>58</sup>

The positive economic impact of a studio can be attributed to direct employment by the studio (estimated at 9000 for the DreamWorks Playa Vista facility)<sup>59</sup> as well as the indirect impact of employment from service providers to the studio's activities. Such service providers include film laboratories, construction houses, prop rentals, and other related industries, as well as those support services that are the same for any large employer, including construction, housing, restaurants, catering, and retail. The DreamWorks studio will create 32,000 jobs for California in addition to the 9000 on-site studio jobs.<sup>60</sup> Similar results have been achieved on a more modest scale in Minnesota, Florida, and many other states.

Unfortunately, the high cost of constructing a new studio is only the first obstacle to creating a significant local production facility. The industrial infrastructure is necessary to make the studio operate productively. This infrastructure includes trained production staff with experience in the skill crafts, carpenters, artists, electricians, and access to communities where professional acting talent lives or will purchase second homes. Industrial support services must also be located within a convenient distance, including film laboratories, equipment rental houses for lighting and other equipment, and other ancillary companies.<sup>61</sup>

Minnesota's Paisley Park Studio illustrates a successful new studio. In a market with strong industrial entertainment elements, including award-winning production companies, labs, and crews, the creation of Paisley Park Studio added a 12,000 square-foot soundstage.<sup>62</sup> As a result of his

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studio and surrounding homes and offices "will include Synchronous Optical Network self-healing fibre-optic rings, along with Asynchronous Transfer Mode switches, giving tenants at the complex the ability to transmit vast amounts of speech, data and video at high speeds.").

58. Susan G. Strother, *Palm Beach County Gets First Film OK: Bureau Says Area Ready for Lights, Camera, Action*, ORLANDO SENTINEL TRIB., May 28, 1990, at 13.

59. James Flanigan, *Two Cheers for DreamWorks and a Resurgent L.A.*, L.A. TIMES, Dec. 17, 1995, at D1.

60. *Id.*

61. See, e.g., Strother, *supra* note 58, at 13; Alice Larson, *Minn's Film, Video & Recording Industries Boom*, BACK STAGE, Sept. 11, 1987, at 1.

62. Randy Adamsick, *'Hollywood North' Polishes Reputation; Twin Cities Directors, Production Talent, Studios Earn National Standing*, ADVERTISING AGE, Oct. 30, 1989, at T12.

experience from *Purple Rain*, the artist formerly known as Prince built a commercial-quality facility for \$10 million with sufficient equipment and acoustics to serve both the motion picture and music industries. The facility quickly provided a home for productions that ran "the gamut from local and national ad shoots to music videos, to feature films and album recording."<sup>63</sup> Both the quality and the quantity of musical acts traveling through the Twin Cities have improved since Paisley Park's creation.<sup>64</sup> Nonetheless, the combination of existing market conditions and clout necessary to make a new studio successful remains rare. Instead, most communities see greater opportunities in the area of location production.

## 2. The Location Production

To film "on-location" simply means that the filming<sup>65</sup> takes place somewhere other than a soundstage. Unlike a soundstage, the location is not owned by the production company; thus, the modifications must be approved by the property owner in advance. For cities, counties, and states vying to get a toehold in location productions, the primary selling tool is the scenic nature of the landscape. The success of Astoria, Oregon illustrates the point.

When New Line Cinema chose Astoria, Ore. over Wilmington, N.C. for principal location shooting for . . . "Teenage Mutant Ninja Turtles III," it was because the studio needed something different. Wilmington, the site of the first two "Turtle's" [sic] movies, could not offer proximity to both ocean and mountains. Oregon's rugged Coastal Range and powerful coastline gave the location scouts exactly what they were looking for.<sup>66</sup>

Similarly, the Maine Film Office highlights the features of its region. "Natural assets including mountains, coastline, forests, farms, rivers, lakes, villages, cities and people provide a stunning backdrop for work or play."<sup>67</sup> Nevada's brochure and production guide carries a similar theme, as reflected in the "message from the Governor" printed in the *Nevada Production Directory*: "We take pride in offering a variety of unique

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63. *Id.*

64. Jon Bream, *There Are Several Good Reasons for Opening in the Twin Cities*, STAR TRIB. (St. Paul, Minn.), Aug. 29, 1993, at 6F.

65. Filming may include videotaping and both still and motion photography. Today it may also include filming for digital reproduction on computer disk, optical disk, videotape, or other media. See *infra* note 90 and accompanying text.

66. Paul Gargaro, *Hollywood Northwest*, NORTHWEST FEATURE FILM PRODUCTION, Feb. 1993, at 1.

67. THE MAINE FILM OFFICE, MAINE FILM & VIDEO PRODUCTION GUIDE 9 (1995).

locations, dazzling neon, isolated ghost towns, majestic mountain ranges and desolate dry lake beds. You'll find it all!"<sup>68</sup> For locations in areas that have studios and significant resident production, convenience becomes more critical than scenery. Virtually anything filmed can be shot on-location rather than in the studio; thus, many of the mundane areas become film locations for those production companies already in the area.<sup>69</sup> Every project has specific needs, most of which are not particularly exotic.

### 3. The Various Media

Like locations, the types of projects also differ greatly from medium to medium. The location requirements and the economic impact of filming will vary greatly depending on the type of production and the purpose of the filming. The various media that comprise the entertainment industry can be categorized into a number of distinct production types. While they all share many of the same characteristics, each has a distinct economic impact.

#### a. Feature Motion Pictures

Feature motion pictures are movies most commonly thought of as the product of Hollywood.<sup>70</sup> Budgets for feature films range from a few hundred thousand dollars when made by small, independent film companies to more than \$100 million for the largest spectacles. The average budget is approximately \$10 million for the estimated 375 films made annually.<sup>71</sup> Feature films typically use dozens, if not hundreds, of different locations.

Nevada's Motion Picture and Television Division claims a feature motion picture has six release windows.<sup>72</sup> These include: "domestic and

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68. NEVADA MOTION PICTURE DIVISION OF THE COMMISSION ON ECONOMIC DEVELOPMENT, NEVADA PRODUCTION DIRECTORY 2 (1996).

69. Robert G. Maier, LOCATION SCOUTING AND MANAGEMENT HANDBOOK, 2-3 (1994) [hereinafter LOCATION SCOUTING].

70. MONITOR REPORT, *supra* note 28, at 9 ("Feature Films—material that tends to receive its first viewing in movie theaters or home video.").

71. CALIFORNIA TRADE & COMMERCE AGENCY, CALIFORNIA FILM COMMISSION, ATTRACTING FILM PRODUCTION, A GUIDEBOOK FOR COMMUNITIES 2 (1994) [hereinafter CALIFORNIA GUIDEBOOK].

72. THE MOTION PICTURE AND TELEVISION DIVISION OF THE STATE OF NEVADA, AN ANALYSIS OF FEATURE FILM ECONOMIC IMPACT AFTER RELEASE [hereinafter ECONOMIC IMPACT]. The report describes each of the release windows as creating a separate opportunity to show "Nevada as a tourism destination to a world-wide market numbered in billions." *Id.*

international theatrical release" through first-run motion picture theaters;<sup>73</sup> "pay-per-view," which allows for films to be seen in the home via cable television;<sup>74</sup> "video store rental," which provides copies of the film for sale or rental through retail outlets; "cable television premieres" on premium movie stations such as HBO or Showtime; "network television release" broadcast over the air on television paid for through commercial sponsorship rather than by the viewers;<sup>75</sup> and "syndicated television release" broadcast on local television stations unaffiliated with networks or at times in the television schedule not controlled by the networks.<sup>76</sup> Increasingly, independent films are being created specifically for the video market. Such films will cycle through some or all the stages listed above, with the exception of the first-run domestic theaters.

### b. Industrial Films

A significant segment of production in areas like New York City, Chicago, and the periphery of Hollywood (such as Orange County) is industrial films (or industrials) that traditionally include projects produced as training programs, educational films, and similar non-broadcast markets. The area has expanded tremendously with the advent of home videotape.

Today, "industrials" include corporate image pieces shown to a broad general public, traditional training films, motivational and sales projects, point-of-purchase videos, product demos, employee benefits programs, interactive videos, tape cut-ins for live teleconferences (sometimes global via satellite uplink), and laser disc, CDI and CD-ROM recordings—in short, anything and everything that can go on tape, film, or disc but isn't made for TV or for theatrical release.<sup>77</sup>

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73. For a discussion of the first-run theaters and the distribution practices of the major studios during the era of the studio system, see *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (affirming finding of significant violations of the Sherman Act and ordering divestiture of theaters and sweeping changes in the studios' distribution practices).

74. Cable television service is currently available to 63.3% of the U.S. households. U.S. INDUSTRIAL OUTLOOK, *supra* note 9, at 31-6.

75. The networks traditionally included CBS, NBC, and ABC. Fox Broadcasting became the fourth network in 1986, and presently both UPN (the United Paramount Network) and The WB (Warner Brothers Network) are attempting to create television networks. See Peter W. Kaplan, *Plan for a Fox Network Intrigues TV Industry*, N.Y. TIMES, Oct. 11, 1985, at C34; David Lieberman, *Network Showdown / Two Ventures Enter Race for Prime Time*, USA TODAY, Jan. 5, 1995, at 1B.

76. ECONOMIC IMPACT, *supra* note 72 (listing the six stages in the life cycle of a feature film).

77. Jonathan Abarbanel, *The Industrial Revolution; Industrial Films Go Multimedia*, BACK

While budgets for industrials are significantly lower than for most feature films, the technical requirements and "below the line budget" (which excludes star, director, and producer salaries) are often very similar to that of feature films. As a result, the amount of local spending on a per day basis remains competitive with that of feature films.

### c. Television Production

Television production includes a wide variety of different projects, including specials, one-hour series, half-hour comedies, talk shows, and music videos.<sup>78</sup> Television productions have significantly lower budgets than motion pictures and work on a much tighter time schedule. Unlike feature films and industrials, however, many television productions require weekly or even daily projects. As a result, a regular location for a long-running television show will generate significant local revenue. For example, the recent version of the television series *The Untouchables* generated an estimated \$25 million annually for Chicago during its two year run in 1985–86 while providing significant long-term employment for local production workers.<sup>79</sup> Similar success was generated by *Miami Vice* for Dade County in Southern Florida.<sup>80</sup> In San Diego, more than \$30 million in revenue is attributed to three television series, *Silk Stalkings*, *Renegade*, and *Running Dragon*, which air in the first-run syndication market.<sup>81</sup> One-hour dramatic series have a per episode budget ranging from \$750,000 to \$1.2 million, so that a full season schedule of twenty-two episodes may be budgeted at as much \$26.4 million per season.<sup>82</sup> Made-for-television movies have an average budget of \$2 million per film while mini-series tend to cost approximately \$6 million to produce.<sup>83</sup>

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STAGE, Apr. 28, 1995, at 1.

78. MONITOR REPORT, *supra* note 28, at 9 ("Television shows—refers to programming that tends to be viewed first on either cable or broadcast television; this includes sitcoms, talk shows, movies of the week, soap operas, etc.").

79. Jeff Borden, *Flix Nix Chi. Pix*, CRAINS CHI. BUS., June 12, 1995, at 1.

80. METROPOLITAN DADE COUNTY, FLA., STRATEGIC MANAGEMENT PLAN FOR THE MIAMI-DADE OFFICE OF FILM, TELEVISION & PRINT, FINAL REPORT, 3.6 (June 17, 1994) [hereinafter DADE COUNTY FINAL REPORT].

81. *California Posts Record* 438 *Film Starts in 1994; State Continues as a Favorite Production Location*, BUS. WIRE, Jan. 20, 1995, at 1 ("First Run Syndication" refers to those productions that are created for distribution exclusively on television stations unaffiliated with networks or aired at times when the networks do not provide programming. Although these time slots traditionally were designed for reruns, local programming, game shows and talk shows, this market is beginning to provide new outlets for dramatic series and situation comedies in direct competition with network programming.).

82. CALIFORNIA GUIDEBOOK, *supra* note 71, at 2.

83. *Id.*

#### d. Commercials

As a distinct type of television production, television commercials are actually the most expensive medium as judged on a cost-per-minute basis,<sup>84</sup> generating \$2 billion in annual production revenue.<sup>85</sup> The top commercials may have as many locations as a television episode or industrial film with crew sizes and expenditures comparable to that of a feature film.<sup>86</sup> Commercials are the most frequently shot motion picture form. Television commercials for local retailers are created in virtually every television market in the country. National advertising campaigns tend to be created in the major markets such as Los Angeles, New York City, Miami, and Chicago because of the access to talent and production companies. A commercial usually entails only one day of location shooting with a total budget averaging \$90,000 per thirty to sixty-second spot.<sup>87</sup> Commercials involving complex special effects may take anywhere from days to months in post-production at considerable extra expense.

#### e. Print Photography

Still photography for print advertising, magazines, marketing materials, and book jackets involves a significant component of the film production around the country. With the diversity of scenery and the short distances between the locations, coastal regions like California, New York, and South Florida have become favorite areas for commercial photographers worldwide.<sup>88</sup> In Dade County, for example, still photography grew from \$330,000 in 1980 to \$31.85 million in 1993 and is expected to continue to increase in both the number of productions and the income generated.<sup>89</sup> Photography has the added advantage of requiring few props, relatively small lighting equipment, and great mobility. Some

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84. Jim Fussell, *A Swimming Elephant, 6-Volt Suburbanites and a Bottled Boy Are All Part of Today's High Tech Tout*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Mar. 28, 1995, at 7E (cost of the average 30-to-60 second commercial has tripled to \$300,000 in the last 10 years).

85. CALIFORNIA GUIDEBOOK, *supra* note 71, at 2.

86. Fussell, *supra* note 84, at 7E.

[A]ccording to statistics from the American Association of Advertising Agencies, top national TV advertisers can easily pay more for a 30-second commercial than TV producers pay for some 30-minute shows. An average commercial costs more than \$10,000 a second, and the largest advertisers spend more than half a million dollars on post-production alone.

*Id.*

87. CALIFORNIA GUIDEBOOK, *supra* note 71, at 2.

88. *See, e.g.*, DADE COUNTY FINAL REPORT, *supra* note 80, at 3.1.

89. *Id.* at 3.11.

jurisdictions view commercial photography as an “invisible industry” because it generates revenue while requiring virtually no services or resources.

#### f. Multimedia Software

As one of the most explosive new forms of entertainment, multimedia software applications for CD-ROM, online services, and the Internet have been touted as the future of entertainment and commerce.<sup>90</sup> Multimedia uses digitized pictures shot on or in a manner similar to videotape. The technology and sophistication of image production for multimedia currently ranges from home video production to that of feature films. As this industry continues to grow, however, the expertise and production value will also increase. This industry is particularly important to areas such as Seattle, San Francisco, and Orange County, California where the industrial base already has a strong foundation in software, electronic hardware, and intellectual property.

Each of these segments of the motion picture industry can be found at work in communities throughout the United States and Canada. Every day, productions are filming in one city or another. Most of the productions involve few city or county resources and operate in an efficient, unobtrusive manner. Whatever the type of production, local revenue is generated, jobs are created, and the greater economy is improved. Because of the high stakes involved in this \$21 billion industry, a battle rages to attract and retain production companies in each jurisdiction.

#### C. *Battle for Market Share and the Flight to Hollywood*

The very fact that Hollywood’s dominant role in the production of motion pictures is at risk illustrates what could go wrong in a city that controls an industry. The inception of the motion picture industry and silent movies began in New York City. Thomas Edison’s Kinetoscope and its rival, the American Biograph, competed to dominate the new medium of projected images on a screen within the City. Black Maria, Edison’s film studio, provided a controlled location and an alternative to the “improvised stages that had begun to sprout on rooftops all over New York.”<sup>91</sup> However, increased dominance by Edison’s Motion Picture Patents Company, which controlled the subsequent improvements to the

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90. Vic Sussman & Kenan Pollack, *Goldrush in Cyberspace*, U.S. NEWS & WORLD REP., Nov. 13, 1995, at 72.

91. ARTHUR KNIGHT, *THE LIVELIEST ART* 123 (rev. ed. 1978).



Kinetoscope, and the use of those patents to control the content and production of the films shown on the machines forced filmmakers underground and out of New York. Combined with the weather and landscape, the attraction of the West was irresistible.

Hollywood itself was merely a sleepy little suburb of Los Angeles until the movie people found it and put it on the map. As early as 1910 some of the Eastern companies began junketing to California during the winter months to take advantage of its superb climate and inexhaustible sunshine. Hollywood proved an ideal center for their location work—close to mountains and the sea, desert and farm land. As the Patents war increased in intensity in New York, many of the independents came to settle permanently in Hollywood. Since of necessity they were working with bootleg cameras, it was often convenient to have the Mexican border also close by.<sup>92</sup>

The "Patents war" ended with the Supreme Court decision in *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*,<sup>93</sup> which prohibited the Motion Picture Patents Company from extending the patent on the projectors to the films.<sup>94</sup> The Court also held that, under patent law, no limit on the use of the patented article could be made other than through express agreement.<sup>95</sup> Although Edison's control of the fledgling motion picture industry was over and the product of the patented projectors could no longer be used to control the market,<sup>96</sup> the independent companies that fled to survive had permanently taken root in California. They never looked back and New York never regained its former crown as the entertainment capitol of the United States.

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92. *Id.* at 38–39.

93. 243 U.S. 502 (1917).

94. *Id.* at 513–14.

95. *Id.*

96. *Id.* at 516.

It is argued as a merit of this system of sale under a license notice that the public is benefited by the sale of the machine at what is practically its cost, and by the fact that the owner of the patent makes its entire profit from the sale of the supplies with which it is operated. This fact, if it be a fact, instead of commending, is the clearest possible condemnation of, the practice adopted, for it proves that under color of its patent the owner intends to and does derive its profit, not from the invention on which the law gives it a monopoly but from the unpatented supplies with which it is used and which are wholly without the scope of the patent monopoly, thus in effect extending the power to the owner of the patent to fix the price to the public of the unpatented supplies as effectively as he may fix the price on the patented machine.

*Id.* at 516–17. It is worth noting that the decision rests entirely on the limit of the rights in the patent itself, as limited by Article I § 8 of the Constitution, and does not refer to the Sherman or Clayton antitrust acts.

Just as the domination of the early silent era ended with the Supreme Court's termination of monopoly power, the dominance of Hollywood is coming to a similar end. In *United States v. Paramount Pictures, Inc.*,<sup>97</sup> the Court again found that the practices of licensing and distribution used by major studios created an illegal monopoly violating antitrust sections 1 and 2 of the Sherman Act.<sup>98</sup> The Court ordered divestitures, which, combined with new technological innovations and an increasing sense of realism, loosened the ties between the studios and the filming of productions. Lighter cameras and fewer restrictions fueled a generation of directors who moved out into the landscapes of California and beyond.<sup>99</sup>

By 1977, areas such as Florida were establishing film commissions to attract new production in their communities as costs and regulations began escalating in Southern California.<sup>100</sup> California responded to this pressure by creating the California Film Commission, initially known as the California Film Office, in January 1985.<sup>101</sup> At the same time, the Southern California Association of Governments ("SCAG") attempted to create a "Public-Private Film Center," which was "[p]romoted as the solution to runaway film production."<sup>102</sup> The Center was designed to "streamline permit issuance, collect fees for the city 'with no loss of [city] control, promote cities as filming locations and mediate problems.'"<sup>103</sup> However, as Newport Beach Mayor Turner noted wryly, "[t]he 1984 SCAG effort to establish a film permit center was apparently not successful."<sup>104</sup>

While SCAG failed to create a Public-Private Film Center, it succeeded in preparing a report and motivating those cities and counties that wanted to protect this economic lead. The SCAG Report articulated the fear that Los Angeles' "reputation as the movie production capital of America is being challenged."<sup>105</sup> The report recognized that the impact was being felt in all segments of the industry, from the premiere, Academy Award-winning films to TV commercial production, where New York had

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97. 334 U.S. 131 (1948).

98. *Id.*

99. LOCATION SCOUTING, *supra* note 69, at 2-3; see also SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS, A LUCRATIVE ALLIANCE: LOCAL GOVERNMENTS AND FILMMAKERS IN THE SCAG REGION ECONOMY, 1-2, (Aug. 1986) [hereinafter SCAG Report].

100. DADE COUNTY FINAL REPORT, *supra* note 80, at 2.4-2.7.

101. CAL. GOV'T CODE § 14998.8 (West 1996).

102. Letter from Clarence Turner, Mayor of Newport Beach, to Stella Mendoza, President of SCAG (Sept. 13, 1994) (rejecting a call by SCAG to create a similar one-stop film permit center a decade later).

103. *Id.*

104. *Id.*

105. SCAG Report, *supra* note 99, at 4.

captured sixty percent of production.<sup>106</sup> The report also recognized the greatest potential threat to Hollywood dominance of the industry was the building of new studios in Florida, New York, Houston, and Wilmington.<sup>107</sup>

Despite ten years of effort since SCAG first began the centralized permitting process, the perceived outlook on the competition appears much the same. The Executive Summary stated that "California's position as the leading producer of movies and television is being threatened."<sup>108</sup> Ten years later, the excessive production costs and other difficulties inherent in Hollywood production have pushed California producers into the waiting arms of states eager to participate in this economic windfall.<sup>109</sup> The California Film Commission estimated that California lost \$3 billion in the areas of feature film production, industrial movies, and commercials in 1988. This loss drained revenue from the local and state tax base, moved jobs to other states and countries, and added to the economic downturn in California.<sup>110</sup>

Also in 1988, the Legislature readdressed the loss of production and the growing competition for its revenue:

However, the Legislature finds that the significant benefits provided to California by motion picture production are in jeopardy as a result of the concerted efforts of other states and countries to lure this production away from California.

Therefore, the Legislature finds a need for concerted efforts by California state and local governments to provide an environment supportive of, and conducive to, the undertakings of the motion picture industry in this state. *A key element of this effort is to make California as uniform as possible in the local regulation and permitting of the film industry; as close to a "one-stop permitting" approach as possible.*<sup>111</sup>

However, estimates of loss may not accurately represent the picture. Given California's former control over the motion picture and television industries, the \$600 million loss in production to other states, including about a third to international competition from Canada, may represent the

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106. *Id.*

107. *Id.*

108. EXECUTIVE SUMMARY, *supra* note 28, at 5.

109. *Id.*

110. Phil Sneiderman, *The Hollywood of the High Desert*, L.A. TIMES, Dec. 1, 1989, at F19A.

111. CAL. GOV'T CODE § 14998.1 (West 1991 & Supp. 1996) (emphasis added).

beginning of the end for California's dominance over the production of entertainment.<sup>112</sup> The reported "loss" is really not a loss, but rather a failure to grow at the same pace as other jurisdictions. A study conducted by the Alliance of Motion Picture and Television Producers ("AMPTP") found that while California location production had doubled in the period from 1982 to 1990, the rate of growth was as high as 533% in other states and Canada.<sup>113</sup> There was similar growth in the number of film commissions. Between 1986 and 1990, forty-four new film commissions were opened, with 225 film commissions in existence worldwide, including offices in all 50 states, 125 U.S. cities, and 19 Canadian provinces and cities.<sup>114</sup>

### 1. Florida's Successes

Florida had been a winter vacation spot since the beginning of the twentieth century for New York entertainers and producers. For reasons not fully documented, however, Florida did not retain enough of the entertainment industry to capture the growing motion picture market.<sup>115</sup> Florida did have limited success with television, hosting such popular series as *The Jackie Gleason Show*, *Flipper*, and *Sea Hunt*.<sup>116</sup> By the mid-1970s, efforts within Florida to create a film commission resulted in the Statewide Film Office.<sup>117</sup> South Florida political leaders studied the industry in Los Angeles and New York and recognized they could facilitate some migration to the Miami area. In particular, local officials realized that by streamlining the film permit application process and providing a single office that would issue all permits, as well as assist in locating sites, the

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112. Morgan Gendel, *Canada Goes Hollywood: Runaway Production*, L.A. TIMES, Dec. 7, 1986, at 20.

113. Greg Spring, *Filming Grows at Rapid Clip Outside of California: In-State Filming Doubles But Out-of-State Work Skyrockets*, L.A. BUS. J., Oct. 10, 1994, at 17.

114. *Id.*

115. Reva Weinlaub, *Florida Mounts Campaign to Top N.Y.C. as Film Production Center*, BUS. IN PALM BEACH COUNTY, Oct. 1991, at 55.

Florida was the incubator for the film industry—not California. In 1905, Bill Bittner produced auto races in Ormond Beach, Florida. Other silent film producers followed and within five years Jacksonville's growth paralleled Hollywood. These cities were the two leading film production cities in America. Jacksonville went so far as to adopt an official policy encouraging the film industry to locate there, but by 1917, discouraged by the lack of cooperation they received in Florida, and attracted by special inducements offered by California, the studios abandoned their Florida operations.

*Id.*

116. DADE COUNTY FINAL REPORT, *supra* note 80, at 3.1.

117. *Id.*

area could capture some of the lucrative film business. By 1976, South Florida production was estimated to employ 400 people and generate \$15 million in local revenue.<sup>118</sup> In December of that year, the Dade County Board of County Commissioners recommended creation of a centralized office to handle such production and permit facilitation.<sup>119</sup> Three months later, the Film Coordination Unit of the Office of Economic Development Coordination was formed.<sup>120</sup> The County Manager's administrative order not only created the film office but also eliminated all other permit fees except those fees that cover costs for extraordinary expenses, personnel, equipment, or property provided by the office to the film production companies.<sup>121</sup>

By 1985, the economic impact of the film industry had nearly quadrupled to \$59 million and the director of the Film Office promoted a new plan for comprehensive growth. Although funding limited the implementation of all the suggestions, the list serves as a blueprint for increasing local production.<sup>122</sup>

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118. *Id.* at 3.3.

119. DADE COUNTY, FLA., ORDINANCE 76-112 (Dec. 21, 1976).

120. DADE COUNTY FINAL REPORT, *supra* note 80, at 3.1 (Admin. Order No. 4-34, Office of County Manager (Mar. 1, 1977)).

121. *Id.*

122. The partial list of suggestions included the following:

Develop and maintain comprehensive location files of pictures of the area's most popular public film sites;

Develop and maintain additional databases [for] general information about the local area (climate, tides, geography, transportation, accessibility, land use, governance, and cost of living); local film-related organizations, unions and guilds, business associations; local training programs;

Pursue closer supportive relationships with strategic County departments whose interests are allied with the film and television industry, such as the former Tourism Department, the Greater Miami Convention and Visitors Bureau, and the Industrial Development Authority;

Encourage County departments to use local producers to produce television commercials, public service announcements, training films, and audio-visual presentations;

Assume a more active role in special events relating to the film and television industry, by participating and/or helping to sponsor film festivals, training seminars, conventions, exhibitions, and word [sic] premieres and special screenings of locally produced features;

Promote the development of a back lot on surplus public property for future production use;

Review trade publications for information about upcoming production;

Despite the failure to develop a back lot, create the master calendar, and establish the coordinating council, South Florida achieved most of its goals.<sup>123</sup> By 1988, South Florida's revenue had increased to nearly \$77 million. By 1991, statewide production increased to \$400 million in annual spending and further increased to \$451 million by 1994.<sup>124</sup> Dade

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Attend professional conferences, conventions and trade shows to develop and maintain contacts in the film and television industry;

Increase contact with out-of-town producers who are in town to ensure adequate services are being provided and to discuss future plans and projects;

Follow-up with producers who have worked in Metro-Dade County to obtain feedback on how their productions went, services provided by the County, and suggestions for improvement;

Survey local public administrators who are involved in working with the industry to obtain insights regarding problems in the current system of working with the industry and strategies to resolve these problems;

Encourage the establishment of an industry-based reception committee and hospitality fund to provide receptions for out-of-town producers who are scouting the area, at which information could be provided about the production possibilities and resources of the local area;

Host familiarization tours for key out-of-town production executives;

Assist in establishing a South Florida Film and Television Industry Coordinating Council composed of the industry's organizational leaders to provide an on-going forum for the discussion of developments and upcoming events, common problems, and strategic initiatives to promote the continuing development of the local industry;

Assist local industry professionals in producing a promotional movie;

Develop and maintain a master calendar of film-related events, such as meetings, special events, workshops, conventions, conferences, and training programs;

Obtain production shots of projects being filmed/taped in Metro-Dade County for use in informational and promotional campaigns;

Publish a periodic newsletter to provide an update on current developments and a source of general information about the industry;

Develop an advertising campaign to run paid ads in major trade publications to raise the area's visibility within the industry;

More thoroughly analyze local production activity and trends to identify major growth opportunities as well as areas that may require further support.

*Id.* at 3.4-3.5.

123. *Id.* at 3.6.

124. Felicia Levine, *State Minds Its Bizness*, VARIETY, Nov. 20, 1995, at 29.

County production represents approximately one-third of Florida's film and print market, with the Orlando/Tampa area receiving another third, and the rest of the State making up the balance.<sup>125</sup>

Few areas have capitalized on the new growth and expansion of the entertainment industry as successfully as South Florida. During its five-year run, the popular and expensive television show *Miami Vice* added visibility to Miami as both a tourist spot and a production market.<sup>126</sup> As California and New York experienced a series of major setbacks, Florida prospered with an increase in the production of television series and films.<sup>127</sup> The increase in production allowed more independent companies to open in Florida, providing the staffing, services, and sophistication necessary for other production companies to enter the market. As the cycle expands, the production company infrastructure falls into place.<sup>128</sup> Supported by free film permits and other economic incentives, Florida was able to lure not only individual productions but also production companies, talent agencies, advertising agencies, equipment houses, and other segments of the film and television industry. These companies now number over 800.<sup>129</sup>

Most impressive has been the growth of print photography throughout the last five years. Miami is issuing on average seventy-five permits for print photography daily while Los Angeles reportedly dropped to less than twenty-five in 1993.<sup>130</sup> Even though Los Angeles has since recovered somewhat,<sup>131</sup> 1995 remains a record year for Florida.<sup>132</sup>

The success of Florida is also due, in part, to the ways in which the local production has capitalized on the State's resources. The area has developed significant resources for Spanish-language television in the United States and serves as a link between the U.S. market and Latin America.<sup>133</sup> In Tallahassee, a new department has opened at Florida State

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125. DADE COUNTY FINAL REPORT, *supra* note 80, at 6.

126. David Villano, *Reel Life: From Movies to Television to Fashion Photography, the Film Business in Miami Looks Like a Growth Industry*, NEW MIAMI, Aug. 1, 1992, at 16.

127. *Id.*

128. *Id.*

129. DADE COUNTY FINAL REPORT, *supra* note 80, at 2.9.

130. Bruce Horovitz, *Tough L.A. Permit Process Puts Miami in Focus for Fashion Photography*, L.A. TIMES, Dec. 7, 1993, at D1.

131. Such revenue remains cyclical and the successes or failures of the community will necessarily affect national and international production. Los Angeles was hurt by riots, wildfires, and flooding during the 1992-93 period. Florida has similarly been hurt by a perception of danger to tourists based on a series of murders of German tourists.

132. Levine, *supra* note 124, at 29.

133. DADE COUNTY FINAL REPORT, *supra* note 80, at 2.10-11.

University, creating one of the nation's largest and most technically advanced film schools.<sup>134</sup> The university has a facility with a 155 seat theater, digital equipment, and other post-production facilities.<sup>135</sup> The Orlando area has seen location and studio work expand tremendously with the creation and growth of Universal Studios and Disney/MGM Studios.<sup>136</sup>

Florida Film Commission's active role in luring production out of California and has further spread the growth of Florida's film industry. Since the hiring of John Reitzammer in 1991 as Florida's first film and television commissioner, the Commission has opened a film office in California to further attract production and provide service to the industry. The Commission also unified the marketing efforts of Miami and Orlando; created the Florida Film Commissioners Association, comprised of forty county-level film commissioners; and targeted specific projects for the Florida sales pitch.<sup>137</sup>

Ultimately, production companies do not choose locations based on the desire of state governments, but rather the necessary aesthetic look of the locale and the costs of shooting. Florida claims to have lower labor costs than New York or Los Angeles. The reasons for this are twofold: the cost of living is lower in Florida, and Florida is a right-to-work state that "prohibits firms from requiring union membership of their employees, even if the firm is organized," which in turn encourages greater flexibility in the union agreements within the industry.<sup>138</sup> Florida further provides a sales tax rebate for film and video equipment and boasts no personal income tax.<sup>139</sup>

Florida's successes represent what any jurisdiction with reasonable resources and infrastructure can accomplish. Concerted planning at the state and regional level encouraged anchor projects, which in turn created an environment conducive to new businesses. Although Florida only ranks third among film producing states,<sup>140</sup> it has witnessed tremendous growth

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134. Levine, *supra* note 124, at 29.

135. *Id.*

136. Disney licensed the MGM name for the studio in 1985, but disputes over the extent of the license resulted in bitter litigation. *Metro-Goldwyn-Mayer v. Walt Disney Co.*, Los Angeles Cty. Cal., Super. Ct., No. C686329 (1992). As a result of the litigation, Disney retained the rights to the MGM name for a film studio and working soundstage in Florida while MGM-Grand retained rights to create a movie-based theme park in Las Vegas.

137. Villano, *supra* note 126, at 16.

138. DADE COUNTY FINAL REPORT, *supra* note 80, at 2.11.

139. *Id.*

140. Neither Orlando nor Miami can boast of being the third most productive city. That accolade goes to Toronto, which has undertaken very similar strategies to that of Miami in competing for some of the New York market. See *infra* note 152 and accompanying text.



and captured significant new revenue for local business and provided employment opportunities for residents. More important than any perceived race to catch New York and become number two nationally is Florida's continued commitment to increasing the overall production and expansion of the industry.

## 2. Failures in New York

In stark contrast to the explosive growth of Florida's markets was the failure in the original entertainment capitol. New York City remains the second largest film location with significant studios, corporate headquarters, and industry infrastructure; however, even at \$2 billion in production revenue,<sup>141</sup> New York City's significance is more perceived than real. Throughout the 1980s, the City's chief obstacle was the cost of production in a union-dominated market and the perception that local politicians had begun to take film and television for granted. The issue came to a head in 1989, when the major studios demanded significant concessions from the local chapter of the International Alliance of Theatrical Stage Employees. The previous contract expired on October 30, 1989.<sup>142</sup> The new agreement was not ratified by the union employees until May 4, 1990. Throughout the eight-month negotiation period, no new studio production took place and a virtual boycott stopped film and television production on the streets of New York City.<sup>143</sup> The painful labor dispute was followed by a six-month vacancy in the position of Director of the Mayor's Office of Film, Theater and Broadcasting before Richard Brick, former chairman of the Columbia University Film School and a long-time member of New York City's production community, was named to the position.<sup>144</sup> In addition to these issues, Toronto has developed a reputation for being able to deliver New York City's landscapes without New York City's difficulties. These problems culminated a ten-year slide in which New York City's percentage of industry employment dropped from 17.6% in 1982 to 9.7% in 1992.<sup>145</sup>

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141. Lowry, *supra* note 6, at 5.

142. Paul Geitner, *Studios Avoiding N.Y.C. Until Unions Give in Movies*, L.A. TIMES, Dec. 12, 1990, at P10.

143. Thomas Walsh, *NYC Filming Ready to Resume as Local 52 OKs Deal*, BACK STAGE, May 24, 1991, at 1.

144. Amy Hersh, *Dinkins Names New Director of NYC Film-TV Office*, BACK STAGE, Dec. 4, 1992, at 1.

145. John Goldman, *Panel Asks N.Y. to Provide New Studios; The Industry: The Study Also Recommends Other Financial Incentives to Better Compete Against Los Angeles and Other Filmmaking Areas*, L.A. TIMES, Dec. 18, 1993, at F8.

New York City has responded with some success. In his appointment of Richard Brick, former Mayor David Dinkins stated that the City was "committed to seeing the streets of New York teeming with lights, cameras and action . . . ."<sup>146</sup> Mayor Dinkins further "not[ed] that the film industry is the city's third-largest, generating more than \$3 billion in revenues and affecting 75,000 workers."<sup>147</sup> From a dead stop during the strike, the Mayor's Office of Film, Theater and Broadcasting has rolled out the welcome mat, emphasizing not only the free services provided by its office but also the free use of all public property in the City of New York.<sup>148</sup> The free services and aggressive marketing are paying off by increasing the visibility of New York City's local productions and increasing production levels above the pre-strike numbers. Nonetheless, the number two market for film and television production remains far behind Los Angeles and is being challenged by Florida's aggressive marketing to the south and Toronto's lower costs to the north. New York has a tremendous amount of work to do just to keep pace.

### 3. The Canadian Threat

For the U.S. entertainment industry, the intrastate competition is a matter of parochial concern. All productions help the U.S. economy. The increase in competition from Canada, however, hurts domestic revenue, moving jobs out of the United States and fueling protectionist concerns. The trip north was originally motivated by dollars—specifically the Canadian dollar, which dropped dramatically in the mid-1980s.<sup>149</sup> The Canadian dollar has since improved its position against the U.S. dollar,<sup>150</sup> but the infusion of production in the 1980s created an infrastructure that has continued to grow, fueled by U.S. projects rather than domestic filmmakers or the Canadian television market.<sup>151</sup>

The growth of the Canadian market has been particularly pronounced in Vancouver and Toronto. Toronto has become the third largest revenue-producing North American city behind Los Angeles and New York.<sup>152</sup> Toronto boasted approximately U.S. \$244 million in local revenue for

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146. Walsh, *supra* note 143, at 1.

147. *Id.*

148. Lowry, *supra* note 6, at 5.

149. Nina J. Easton, *Orlando, Fla.—Will It Become Hollywood East?*, L.A. TIMES, Apr. 9, 1989, at C6.

150. *Dow Up 47*, CHI. SUN-TIMES, Oct. 11, 1996, at 4.

151. Brendan Kelly, *Focus Sharpens on Prod'n*, VARIETY (Canada), Nov. 22, 1993, at 39.

152. Clyde Farnsworth, *Chameleon Toronto Becoming a Leader in Film Production*, COURIER-JOURNAL (Louisville, Ky.), Oct. 17, 1993, at 51.

1993.<sup>153</sup> In Vancouver, where similar growth has occurred, the rapid development has created a labor problem. Overlapping unions are competing for membership and control, disrupting locations and costing production time and money.<sup>154</sup> Unlike New York City, however, a crisis was averted when the producers began talks with union leaders to settle the conflicts through negotiations.<sup>155</sup>

#### 4. The Southern California Response

After ten years of hearing the economic message, as well as five years of negligible economic growth in Southern California, Los Angeles' political and civic leadership has begun to heed the call and respond to the competition. Tax incentives for the Dreamworks SKG studio in Playa Vista are an example.<sup>156</sup> The California Film Commission has also developed a high-tech location system using state-of-the-art digital imagery along with the expertise of NASA's Jet Propulsion Laboratory.<sup>157</sup> The system will allow film producers around the globe to review pictures and data on possible locations in California twenty-four hours a day via the Internet in order to assess the quality of California locations.<sup>158</sup> In Los Angeles and Orange Counties, the economic home of Hollywood, efforts have been made to streamline the film permit process, reduce fees, and better serve the industry.

Possibly more important than the financial incentives are the attempts at streamlining the regulatory process throughout Southern California. Both the City and County of Los Angeles considered streamlining and simplifying the permit process to reduce the time and cost of location filming, but as the discussions continued, out-of-state competition took the lead. New York City does not require permit or public land charges. Similarly, no permits are required to film anywhere in Texas. The Metro-Dade County area had unified permitting as early as 1977. Meanwhile, the 1984 SCAG effort to create a one-stop permit program never issued a single permit and the Florida State Legislature's commitment to unified permitting fell on deaf ears.

153. *Id.*

154. Jon Patch, *All's Not Quiet on the Western Front: Labour Problems, Neighbourhood Invasions and Plain Old Growing Pains Threaten the Future of BC's Film Industry. Did We Mention the Dollar?*, *EQUITY-VANCOUVER*, July 1995, at 50.

155. *Id.*

156. See Eller, *supra* note 52 and accompanying text.

157. Susanne Gayle Harris, *Can Technology Brighten the Picture?*, *L.A. TIMES*, Oct. 25, 1994, at D4.

158. *Id.*

Finally, in 1995, Hollywood began to take heed. In July of that year, the Los Angeles City Council and the Los Angeles County Board of Supervisors both voted to delegate the permit process to the Entertainment Industry Development Corporation ("EIDC"), a separate nonprofit agency that has the potential to grow into the Southern California permit center.<sup>159</sup> The EIDC intends to provide permits for the core areas of Hollywood, including the City and County of Los Angeles, and it is committed to providing much more. The EIDC will assist with location information, facilitate permit applications, and help local officials with location management throughout Southern California.

Many Southern California cities will not initially agree to delegate permit control to a non-city agency;<sup>160</sup> however, few cities will turn down the assistance of the EIDC in handling the process.<sup>161</sup> For filmmakers, the effect may be the same as a true one-stop film office. A single telephone call to the EIDC will be all that is necessary to begin the permit process for each one of the over 120 separate jurisdictions in Los Angeles and Orange Counties, especially with the online system for location management and permitting.<sup>162</sup> The continuing efforts of both the EIDC in streamlining the permit process and the California Film Commission in promoting California and assisting production companies have combined to make Hollywood more than competitive in the race to capture this expanding industry.

Another California success story occurred in the southern end of the Hollywood zone, Orange County. In Orange County, a public/private partnership between the County and the Orange County Chamber of Commerce & Industry<sup>163</sup> created the Orange County Film Office. The mission of the Film Office was to market Orange County to the motion picture and allied industries, expand production throughout the area and simplify the permitting and regulatory process in the thirty-two separate jurisdictions of Orange County.<sup>164</sup> Orange County was in the perfect

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159. Robert Goldrich, *Southland Express*, SHOOT, Nov. 3, 1995, at 38.

160. This is a reason that all earlier efforts at a one-stop film permit office have failed.

161. Goldrich, *supra* note 159, at 38.

162. *Id.*

163. The Orange County Chamber of Commerce & Industry has since expanded to become the Orange County Business Council through a merger with the Industrial League of Orange County. See Howard Fine, *Single Voice: Chamber, League Complete Merger*, ORANGE COUNTY BUS. J., May 1, 1995, at 7.

164. ORANGE COUNTY FILM OFFICE (A PUBLIC/PRIVATE PARTNERSHIP), AGREEMENT NO. D94-113 BETWEEN ORANGE COUNTY CHAMBER OF COMMERCE AND INDUSTRY AND ORANGE COUNTY ENVIRONMENTAL MANAGEMENT AGENCY, July 1, 1994 (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

position to expand production, with an annual county expenditure of \$216 million in payroll and payments to local businesses.<sup>165</sup> This revenue made Orange County the second highest revenue-generating county in California, and yet much of the payroll was earned in Los Angeles by residents forced to commute into Hollywood. Finally, after a number of false starts, Orange County's elected leaders and volunteers in the nonprofit and business sectors joined forces in a concerted effort to support and expand local production.<sup>166</sup> The Film Commission assisted fifty-eight productions in the last six months of 1994.<sup>167</sup> Despite the subsequent bankruptcy of the County government, the Film Commission continued to thrive. The Film Commission works with the County and thirty-one separate cities on streamlining and improving the film permit process while marketing the County to the industry.

In its first year of operation, the Orange County Film Commission's economic impact was \$6.3 million and provided comprehensive permit reform tools for all the cities in the area.<sup>168</sup> The Commission's brightest moment, however, is anecdotal. Working with the City of Orange as well as representatives from the EIDC, the Commission was able to facilitate two weeks of filming for Tom Hanks' movie *That Thing You Do* in the Orange Plaza. This very location had been declared off limits to filming the year before by city officials after a one-day Toyota commercial had been mishandled, creating a public relations nightmare. The film resulted in \$50,000 in downtown improvements, reimbursements to local businesses that were forced to curtail retail activity during the production, and increased sales and publicity for other nearby merchants from the two-week stay in the area.<sup>169</sup>

A success like *That Thing You Do* illustrates how local film commissions can work with industry and government to improve relations and provide economic opportunity. The benefits from economic growth and tourism create tremendous incentives for local governments to support the industry and assist in attracting additional production.

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165. MONITOR REPORT, *supra* note 28, at 19.

166. Daniel Moore, *Film Office Alive in Beleaguered O.C.*, DAILY VARIETY (N.Y.), Mar. 3, 1995, at 40.

167. *Id.*

168. ORANGE COUNTY FILM COMMISSION, YEAR END REPORT FY 1994-95, (Dec. 1995).

169. See Vivian Le Tran, *Hanks' Movie Calls It a Wrap*, ORANGE COUNTY REG., Dec. 14, 1995, at 3.

### III. REGULATING THE LOCATION PROCESS THROUGH PERMITTING

#### *A. Role of the Film Permit Ordinance*

Whenever a production company wishes to film on public property, the company typically must apply for a film permit or otherwise comply with local zoning or land-use laws.<sup>170</sup> In some situations, these requirements apply to productions on private property as well. The regulations regarding the permit process are detailed in the city or county ordinance or in regulations promulgated under a provision in the ordinance. Jurisdictions vary in their approach taken in the ordinance. Some ordinances provide very specific details regarding the regulation of the filming and permitting process, while others provide broad outlines, giving substantial discretion to the city or county official in charge of the permits.<sup>171</sup>

The permit process allows cities to control the work done within their borders. Similar to zoning ordinances or park regulations, the film permit ordinance should balance the needs of the local government, the economic opportunity, and the needs of each constituency within the community while maintaining public safety, convenience, and security. A well-drafted ordinance will promote compliance with the ordinance and encourage responsibility by the individuals and companies that operate under it.

The failure to require a film permit may result in other difficulties. Jurisdictions with no film permit ordinance may resort to special event ordinances or other codes to regulate film activity, but these are not well suited to the issues involved in film production.<sup>172</sup> Smaller production companies will simply ignore those ordinances that make compliance with them too difficult. These companies will simply "steal" the location and

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170. See, e.g., CALIFORNIA MODEL FILM ORDINANCE, § II(A) ("No person shall use any public or private property, facility or residence for the purpose of taking commercial motion pictures or television pictures or commercial still photography without first applying for and receiving a permit from the officer designated by the city/county."); TEXAS PRODUCTION MANUAL 1995, Vol. XVI, at 284 ("Film permits are not required by the State of Texas. There are, however, various state and municipal regulations which may apply to certain film production activities.").

171. See, e.g., NEWPORT BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.46, § 10 (1988) ("No person shall use any public property or facility for the purpose of taking still, motion, or television pictures without first applying for and receiving a permit therefor from the City Manager, or his or her authorized representative.").

172. JON GARON, FILM PERMIT PROCESS GUIDE, A GUIDE FOR CREATING A LOCAL FILM PERMIT ORDINANCE AND COMPLYING WITH THE UNIFORM FILM PERMIT ACT 6 (Orange County Film Commission, Oct. 6, 1995) [hereinafter O.C. PERMIT GUIDE].

move on. The jurisdiction would have no oversight nor any opportunity to provide police or fire management or other safety measures.<sup>173</sup> If properly drafted and efficiently implemented, the film permit can create new opportunities for cities and filmmakers alike.

### *B. Governmental Policies Underlying the Permit*

#### 1. Economic Expansion

The economic opportunities generated through location filming were illustrated in Part II and need not be restated here. It must be noted, however, that residents of local communities will not remain residents if there are no economic opportunities. The viability of local communities depends on balancing economic opportunities with quality-of-life issues.

The economic impact of spending throughout a community is sometimes referred to as a "ripple effect."<sup>174</sup> The first economic ripple includes the direct budgetary spending by the production company. The second ripple comes from the independent local businesses that serve film companies along with other purchasers within the community, such as lumber yards, hairdressers, hotels, and restaurants. Finally, the third ripple results from the business activities of those independent local suppliers, such as the lumber mill suppliers, hotel suppliers, and restaurant bakeries and food suppliers.<sup>175</sup> The last two ripples promote the purchase of equipment, supplies, and labor from the local community. Local residents may benefit greatly from these indirect benefits without ever realizing the source of the income. The local economy will benefit from taxable income for the community in sales tax at each of the transaction levels, payroll taxes for those employed directly or indirectly, and property taxes generated on the homes they own.<sup>176</sup> The multiplier calculates the result of the ripple effect, so that the waves of economic expansion can be measured and felt within the community.

For city governments trying to improve the quality of life for their residents, the economic opportunity in location production may be an ideal

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173. *Id.* at 7.

174. SCAG Report, *supra* note 99, at 7.

175. *Id.*

176. See MONITOR REPORT, *supra* note 28, at 19. The quantification of these ripple effects is calculated through the use of a multiplier that estimates the extent to which the ripples extend into the economy. The California Trade and Commerce Agency calculated a multiplier of 2.12 to reflect the employment ripple effect in California. A multiplier of 1.0 indicates no ripple effect. *Id.*

alternative. Filming is touted as “a clean, non-polluting” industry<sup>177</sup> that generates local spending and income, encourages tourism, and creates a positive community image. Given these economic benefits, local governments should start the regulatory process from the perspective of positive economic opportunity for its residents. In doing so, they should create procedures and regulations that maximize these opportunities while minimizing the impact on other residents and community services.

## 2. Balancing the Needs of the Neighborhoods—Community Convenience

Protecting the community from improper conduct or significant disruptions remains one of the principal purposes of the film permit ordinance. The vagabond existence of film production companies organized to make a single film and then disappear, the outsider status of film companies traveling to a location, and the anecdotal evidence of disruption and destruction combine to make filming appear as a threat to the community rather than an economic opportunity. Thus, communities regard the film production as merely an “intrusion” that needs to be minimized, if not eliminated.<sup>178</sup>

These fears are not entirely unfounded. The history of Newport Beach, California provides a classic example. In 1986, Cannon Films requested a permit to explode a boat in Newport Harbor. Although the City refused, the California Fish and Game Department gave Cannon permission to destroy the forty-six-foot craft in Upper Newport Bay, just outside the City’s jurisdiction.<sup>179</sup> The boat was over-packed with dynamite. An explosion and fire intended to last for seconds burned for forty minutes, hurling debris into nearby homes and forcing the closure of the Orange County airport.<sup>180</sup> Newport Beach could not protect itself because it had allowed the production company to obtain permission from a nearby governmental agency that had the authority to issue the permit but no mechanism or interest in monitoring the production’s impact on the City. Newport Beach recognized the need to regulate and responded by increasing its involvement in the planning process for filming rather than prohibiting future filming. As a result, the City aggressively expanded its

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177. CALIFORNIA GUIDEBOOK, *supra* note 71, at 1.

178. See, e.g., *Film Office Shake-up Sounds Alarm*, L.A. TIMES, Aug. 27, 1994, at B1; John Westcott, *Newport Beach’s Energetic Film Liaison Is Helping the City See the Big Picture*, ORANGE COUNTY REG., Oct. 19, 1995, at 1 (describing a problematic production with Cannon Films: “The next day they were gone like gypsies . . . [I]t was a nightmare.”).

179. Westcott, *supra* note 178, at 1.

180. Chris Woodyard, *Movie Moolah*, L.A. TIMES, Aug. 21, 1994, at D1.



local film production while reducing the number of complaints and incidents.<sup>181</sup>

The objective for responsible governments is to minimize the risk without eliminating the economic opportunity. Local authorities must balance community risks with the economic benefit for filming just as they do when zoning for gas stations, dry cleaners, and other uses of hazardous materials, or providing noise and crowd controls for sport stadiums and civic centers. Filming should be managed to maximize value while minimizing the impact on the community.

Some local authorities fear that relinquishing local control will mean that another agency will not be sensitive to the local needs. This was part of the problem in Newport Beach. The California Fish and Game Department correctly assessed that there would be little impact on the Pacific Ocean from the destruction of one wooden boat. Neither the residents nor the airport were in its jurisdiction, so the Department did not assess the impact upon them. Such problems have played a significant role in undermining the movement in Southern California to create a true one-stop regional film office.

In a letter from the former mayor of Pasadena, that City rejected SCAG's invitation to join the Regional One-Stop Film Permit Center because it perceived the Center as adding a layer of bureaucracy without solving any problems. The Center stated:

[It would] not begin to address the negative response we would receive from our residents and merchants. Many will perceive any involvement with the [Regional One-Stop Permit Center] as a loss of local control and regulation. Many will respond by being less film-friendly and supportive of our efforts to prevent runaway film production.<sup>182</sup>

Hidden in this statement lies the suggestion (or threat) that no one other than local officials could manage the delicate balancing necessary to keep local residents pacified and agreeable to filming.<sup>183</sup>

181. *Id.*

182. Letter from Kathryn Nack, Mayor of Pasadena, California, to Ms. Stella Mendoza, SCAG President 2 (Sept. 22, 1994) (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

183. This is not to suggest that local control will result in better management and community relations than regional permit offices. It is critical that the permitting authority be sensitive to the needs and personalities of the communities for which it is responsible. Sensitive neighborhoods, problem traffic areas, and other "hot spots" must be anticipated. There must be confidence in the local government and local residents that such concerns are addressed. For example, the Newport Beach explosion incident may, in part, be attributed to retention of local control. Had a larger, regional film office been in place, the City could not have been side-

Keeping residents pacified is a constant challenge. "You've got to convince people once in a while that they have to put up with a little inconvenience,"<sup>184</sup> explained Roger Mayer, president and CEO of Turner Entertainment Co. "Everyone would like to have (a movie) shot in the next block."<sup>185</sup> The not-in-my-backyard attitude toward local filming is fairly universal. In New York City, the return to filming after the 1989-90 union strike was accompanied by a negative response among the residents.<sup>186</sup> In Hermosa Beach, California, some residents brought a suit to stop the use of a local beach house as the location for *Beverly Hills 90210*.<sup>187</sup>

Governmental response to local concerns may not always be measured or appropriate. To protect from the dangers of filming a funeral procession on a city street, the City Council of Reading, Pennsylvania, required insurance of \$25 million instead of the standard \$1 million.<sup>188</sup> The filming involved no fireworks or other environmental hazards, but the fear was substantial. Ultimately the City Council relented, but such hurdles to film production are not conducive to good community marketing.

Instead of blanket prohibitions, city councils should utilize more practical mechanisms to promote responsible filming and good relations with the local residents. Problems in residential neighborhoods generally include excesses in parking, noise, lighting, and special effects.<sup>189</sup> If roads are closed, access also becomes a problem. These problems can be handled either through the ordinance itself or by using some discretion in the authorization of the permit. Most of the problems can be limited by requiring that film activity not begin before a set time, generally the same time specified for construction. Outdoor activities can be required to finish by 10:00 p.m. or midnight, unless an additional waiver is provided in the permit.

The permit ordinance should always provide for discretion by the permit office or the individual authorized to waive the requirements. This way, flexibility can be maintained and a film crew operating under a

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stepped by the production company and the Fish and Game Department. An office with greater experience monitoring explosions would have been responsible for the permit while proper fire authorities would have had an opportunity to review the amount of dynamite used for the detonation. It is important to understand the needs of the community and the production company, so that both may be treated fairly.

184. Woodyard, *supra* note 180, at D1.

185. *Id.*

186. Lowry, *supra* note 6, at 5.

187. See John Horn, *Some California Towns Are Getting Fed up with Film Crews*, DALLAS MORNING NEWS, Dec. 14, 1993, at 1W.

188. Pamela Rohland, *Reading Relents on Filmmaker's Request*, E. PENN. BUS. J., July 4, 1994, at 1.

189. See LOCATION SCOUTING, *supra* note 69, at 115-16.

deadline can work with the neighbors to find some accommodation when the need and the size of the production demand it.<sup>190</sup> Accommodations may include offering neighbors hotel rooms and reasonable compensation if they feel that the filming will be too disruptive, or renting driveways to assist with parking and mollify neighbors. Problems with outdoor lights can often be handled with screens that obstruct the lights from sensitive areas. Access can be handled by using intermittent traffic controls to stop traffic only for the time of actual shooting and not preclude all traffic.<sup>191</sup> Alternatively, full closures may be necessary; however, alternatives should be planned for in advance and notice of the closure should be well-posted.<sup>192</sup>

The California Film Commission has promulgated a Filmmakers' Code of Professional Responsibility, which sets out eleven guidelines to help with civility and courtesy on the location.<sup>193</sup> These guidelines merely require that those affected by filming are given notice of the shoot prior to filming, vehicle engines are turned off quickly after parking, vegetation is not trimmed nor trampled, and the cast and crew are quiet and courteous.<sup>194</sup> A similar code has been designed for the resident or merchant whose property is being used as a location. The "Community 'Good Neighbor' Code of Conduct" begins as follows:

TO RESIDENTS AND MERCHANTS: As soon as film crews arrive at your property and you become a filming host, both you and the crew become guests in the surrounding neighborhood. Although you may see hosting filming at your property as an inalienable right to engage in free enterprise, your neighbors may not share the same sentiments. It is incumbent on you and the film crews to conduct yourselves in a manner that ensures that filmmakers will be welcomed back into your neighborhood. By adhering to the following code of responsibility, you will be

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190. *Id.* at 117 ("[The] negative effects can be minimized by proper communication with the neighbors, common courtesy, and quick thinking.").

191. CALIFORNIA FILM COMMISSION, ON LOCATION—LAW ENFORCEMENT GUIDELINES 11 (1995) [hereinafter ENFORCEMENT GUIDELINES].

192. LOCATION SCOUTING, *supra* note 69, at 157.

193. CALIFORNIA FILM COMMISSION, STATE OWNED/OPERATED PROPERTIES: FILMMAKERS' CODE OF PROFESSIONAL RESPONSIBILITY.

194. *Id.* ("TO THE INDUSTRY: You are guests and should treat this location, as well as the public, with courtesy. If we do not all work toward improving our relationship with the local communities in which we film, we will see more production leaving California, resulting in fewer jobs for all of us. Please adhere to the following guidelines.").

doing your part to keep California a film-friendly place to do business.<sup>195</sup>

The courtesy suggested by the two codes of conduct will serve to minimize the intrusion problems in the neighborhoods. Jurisdictions can adopt these codes and append them to the film permit; however, voluntary compliance will probably handle most problems. Small shoots for commercial photographers, industrials, and low-budget film and television often take place without ever being noticed by neighbors. The community outreach requirements should be proportional to the size of the potential disruption.

Some of the best examples again come from Newport Beach. This City uses a film liaison, who is an independent contractor, to handle all problems for both the production company and the City. Joe Cleary, the film liaison for Newport Beach, works with the production company to shape the request for filming in such a way that the City can approve.<sup>196</sup> Mr. Cleary's most important task is to work with the production company to prepare the community in advance. On one occasion, he convinced the production company to buy sixty pizzas for the displaced beach users.<sup>197</sup> On another occasion, the production company promised T-shirts and tapes for the music video produced in an upscale neighborhood.<sup>198</sup> Newport Beach's approach and Cleary's effectiveness have resulted in expansion of film production since the ill-fated Cannon Films explosion.<sup>199</sup> Complaints are down, turnaround time for a film company has been reduced from weeks to hours, and local revenue is at a record high.<sup>200</sup> The community concerns of public convenience are not dismissed, but instead are anticipated. By anticipating community concerns and using measured responses, the local government or permitting authority can minimize the inconvenience and disruption of filming without reducing the amount of production.

### 3. Public Safety—Role of Police and Fire

The primary concern of local authorities is public safety. No economic benefit is worth risking the lives, health, or safety of individuals, residents, actors, or film crew. This principle should govern the choices

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195. CALIFORNIA FILM COMMISSION, COMMUNITY 'GOOD NEIGHBOR' CODE OF CONDUCT.

196. Woodyard, *supra* note 180, at D1.

197. *Id.*

198. Westcott, *supra* note 178, at 1.

199. See *supra* 179–181, and accompanying text.

200. *Id.*

made by every film production company and certainly govern the decisions made by the permitting authority in the authorization to film and the restrictions placed on such authorization. Fortunately, most filming is fairly mundane and the pyrotechnics, high-speed chases, and gunfights associated with blockbuster films occur infrequently. Nonetheless, both the police and fire departments need to be involved with the film permit application and the production shoot if there will be a road closure or use of explosives.<sup>201</sup> While the local traffic department may actually authorize the road or lane closure, implementation comes from the police department, as it "legally enforces the terms of the permit. The police are usually the only people who can legally direct traffic around or away from the shooting area. The traffic department might make all the arrangements, but on-site, the police control the operation."<sup>202</sup> Law enforcement concerns focus on traffic issues such as parking, speed, road closures, and clean-up. Security and public relations are also part of the obligation for police when working on location.<sup>203</sup> The guidebook prepared for police assigned to work at film productions describe the unique obligations of the law enforcement personnel:

The city, county, state or federal jurisdiction you represent issues a filming permit which serves as a contract between the community and the film company. In almost all cases, they assign one or more retired or off-duty police officers to the detail . . . . Your responsibility is to enforce that permit; to protect the concerns and interests of the jurisdiction while still enabling the company to make their movie . . . . The company should not be doing anything that is not stipulated or implied in the permit. If they ask you if they can do something not written into the document, use your discretionary authority to approve or deny their request. Weigh safety factors, inconvenience to the public and conditions of the filming site before deciding.<sup>204</sup>

Critical to this description is the emphasis on the officer's discretionary authority to solve problems and facilitate production while ensuring public safety and convenience.

The police are particularly concerned with the use of public roads when filming, not only because of safety concerns caused by permits that

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201. O.C. PERMIT GUIDE, *supra* note 172, at 8. ("Police should be involved in traffic control and some crowd control situations. Fire should be involved in pyrotechnical scenes and large stunts.").

202. LOCATION SCOUTING, *supra* note 69, at 157.

203. ENFORCEMENT GUIDELINES, *supra* note 191, at 13, 14.

204. *Id.* at 1.

allow for speeds above the posted limit but also because of speeds substantially below the posted limit, which are necessary for filming but which may impede the flow of traffic.<sup>205</sup> The police should assist the film company to minimize the impact of the lower speeds on traffic. Additionally, the police officer must ensure that there is adequate parking without unduly disrupting the neighborhood.<sup>206</sup>

Similarly, the role of the fire department is to "achieve a reasonable degree of safety on the set."<sup>207</sup> The fire department and the fire safety personnel ensure that safety precautions minimize the risks from fire, firearms, special effects, and stunts. "Most cities and towns do not require fire personnel to be on [the] set unless special effects with fire and/or explosives are being used."<sup>208</sup>

The safety concerns of filming hazards are not that different from hazards in other industries, despite the image of filmmaking. "Film production encompasses a wide variety of what appear to be unusual hazards; however, when analyzed it becomes evident they are very similar to those found in many other occupancies. Once this is recognized, inspection of filming sites becomes a matter of regulating these hazards."<sup>209</sup> The Fire Protection Handbook encourages local fire departments to use the flexibility provided by state law "to make workable, practical solutions which protect safety and allow completion of the filming."<sup>210</sup>

While nothing can be made risk-free, many accidents are preventable. For productions using stunts or special effects, the safety officer becomes a valuable ally to make the shot work in the safest and most efficient method possible. "With the exception of pyrotechnic materials, a routine fire inspection with reasonable code application and sound judgment can resolve any fire and life safety problem."<sup>211</sup>

For the filming of pyrotechnical effects and stunts, the role and mission of the fire safety officer is clear. "Fire safety officers should always come prepared to handle unusual activities, especially when special effects and stunts are being performed. DO NOT BE AFRAID TO GET

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205. *Id.* at 10.

206. LOCATION SCOUTING, *supra* note 69, at 157; ENFORCEMENT GUIDELINES, *supra* note 191, at 5-7.

207. OFFICE OF STATE FIRE MARSHAL, FILMING IN CALIFORNIA, A FIRE PROTECTION HANDBOOK 4 (1993) [hereinafter FIRE PROTECTION HANDBOOK].

208. Joe O'Kane, *Beyond the Call of Duty*, LOCATIONS, May-July 1995, at 18.

209. FIRE PROTECTION HANDBOOK, *supra* note 207, at 4.

210. O.C. PERMIT GUIDE, *supra* note 172, at 9.

211. FIRE PROTECTION HANDBOOK, *supra* note 207, at 4.

INVOLVED! Asking questions about activities you are not familiar with is what will make you a better and more responsible safety officer."<sup>212</sup> For stunts, the fire safety officer must work with the production company's stunt coordinator.<sup>213</sup> Many of the instructions for the fire safety officer do not require specific knowledge about the stunt, but rather a degree of common sense and awareness of general safety procedures. The fire safety officer must pay attention to the stunt preparation and watch for faulty safety equipment or unsecured devices. The officer should check the emergency equipment and review the methods for aborting the stunt. Most importantly, the officer should take care that time pressure or fatigue does not cause the stunt coordinator or director to make inappropriate choices.<sup>214</sup>

Weapons are also an issue of common concern. Live ammunition is generally not used or even allowed on film sets because of its inherent danger.<sup>215</sup> Weapons that shoot blanks still have the potential to be deadly and should be treated as loaded weapons for safety purposes. Such a weapon is considered property or a "prop" and handled by the property master on the set. While the California Fire Marshal has created a set of suggested guidelines for the handling of prop weapons, enforcement of the guidelines is relegated to the property master.<sup>216</sup>

Pyrotechnics or flammable special effects are the other area in which the fire safety personnel plays an important role in protecting the safety of the production. Pyrotechnics will generally be subject to regulation under the same state code provisions that regulate fireworks or other fire hazards.<sup>217</sup> Additionally, the individual who operates the pyrotechnics may also need a license in some jurisdictions.<sup>218</sup> The fire safety personnel

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212. *Id.* at 10.

213. "A Stunt Coordinator oversees, prepares, choreographs and usually performs the stunt him/herself. Creating a stunt requires technical knowledge, skills and experience which can only be accomplished under the supervision of the Stunt Coordinator." FIRE PROTECTION HANDBOOK, *supra* note 207, at 60.

214. *Id.* at 60-62.

215. *Id.* at 35.

216. CAL. HEALTH & SAFETY CODE § 12540 (West 1991).

As a rule, live ammunition is not permitted on a filming set due to its inherent danger. A weapon which fires blanks is considered "property" (or "prop") and is under the control of the Property Master. Blanks, when improperly handled and fired from a gun, have produced serious, even fatal, injuries. The responsibility for the safeguarding of all personnel in proximity to such props rests with the Property Master.

FIRE PROTECTION HANDBOOK, *supra* note 207, at 35. Such recommendations include: "Treat all firearms as if they are loaded;" "Never have your finger on the trigger until actually firing the weapon;" and "Never leave weapons unattended." *Id.*

217. See CAL. HEALTH & SAFETY CODE § 12000 (a)-(e) (West 1991).

218. See CAL. HEALTH & SAFETY CODE § 12578 (West 1991); FIRE PROTECTION

should review the activities of the licensed pyrotechnic coordinator to ensure that applicable safety precautions have been taken: that the flammable materials are handled properly, that emergency equipment is available, and that there are no bystanders or others who could be injured accidentally.<sup>219</sup> Pyrotechnics for film are like any other fireworks display or other similar industry that involves flammable material. By exercising reasonable precautions and minimizing the exposure to risk, even the most spectacular special effects can be handled without significant safety concerns.

The public safety concerns addressed by the police and fire safety guidelines are the most important aspect of the film permit requirements. The guidelines serve to protect residents, cast, and crew alike. The film permit also provides a mechanism of cooperation between the jurisdiction and the production company to minimize the inconvenience to the local community and promote a positive environment during filming.

### C. Statutory and Constitutional Limits on Location Regulation

The content of the material being filmed is another concern of some permitting authorities. Due to the public relation implications of filming, jurisdictions prefer projects that portray the location in a positive light.<sup>220</sup> Nonetheless, public officials should refrain from reviewing the content of a project as a condition of issuing a film permit because of the constitutional implications such a request would raise.

The First Amendment protection afforded to filmmaking was not available at the inception of the industry. In *Mutual Film Corp. v. Industrial Commission*,<sup>221</sup> a filmmaker challenged Ohio's newly formed censorship board. The duty of the board was to "examine and censor motion picture films to be publicly exhibited and displayed in the State of Ohio. Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board."<sup>222</sup> The Mutual<sup>223</sup> argued that the

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HANDBOOK, *supra* note 207, at 51.

219. FIRE PROTECTION HANDBOOK, *supra* note 207, at 35, 45.

220. In fact, a negative portrayal might even have a negative effect on tourism. The Hollywood adage "there is no such thing as bad publicity" may be true of locations as well, but no systematic study of these negative images is available.

221. 236 U.S. 230 (1915).

222. *Id.* at 239-40.

223. The way in which the company was commonly referred to at the time was "the Mutual." John Wertheimer, *Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 AM. J. LEGAL HIST. 158, 159 (1993).



statute violated the First Amendment; however, the district court ruled that the first eight amendments of the Constitution did not apply to state actions, merely those of the federal government.<sup>224</sup> At the Supreme Court, the Mutual argued that the statute interfered with interstate commerce. The Court, however, dismissed this assertion because the board's review was limited to films exhibited or displayed in Ohio.<sup>225</sup> More importantly, the Mutual challenged the law as a form of restraint on free speech, placing before the Court a question as to whether the law violated the prohibition that "no law may be passed 'to restrain the liberty of speech or of the press,'" provided in the Ohio Constitution.<sup>226</sup> The Court reviewed the issue by questioning whether films fell within the range of activities included in "speech, writing or printing" that are immune from the type of censorship in question.<sup>227</sup>

Are moving pictures within the principle, as it is contended they are? They, indeed, may be mediums of thought, but so are many things. So is the theatre, the circus, and all other shows and spectacles, and their performances may be thus brought by the like reasoning under the same immunity from repression or supervision as the public press,—made the same agencies of civil liberty. . . . We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the bill-boards of our cities and towns . . . and which seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion. The judicial sense supporting the common sense of the country is against the contention.<sup>228</sup>

Common sense prevailed, and the Court unanimously denied protection from censorship.<sup>229</sup> Although many of the Justices later had a change of heart,<sup>230</sup> the proposition that films could be subject to prior

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224. *Mutual Film Corp. v. Industrial Comm'n*, 215 F. 138, 141 (N.D. Ohio 1914), *aff'd*, 236 U.S. 230 (1915), *aff'd*, 236 U.S. 247 (1915). This limitation on the application of the Constitution was repudiated in *Gitlow v. New York*, 268 U.S. 652 (1925); *see also* *Near v. Minnesota*, 283 U.S. 697 (1931).

225. *Mutual*, 236 U.S. at 239–40.

226. *Id.* at 242 (quoting the Ohio State Constitution).

227. *Id.* at 243.

228. *Id.* at 243–44.

229. DONALD LIVELY, *MODERN COMMUNICATIONS LAW* 10 (1991).

230. Wertheimer, *supra* note 223, at 161 ("Even one of the associate justices who in 1915 had joined the rest of the Court in endorsing McKenna's ruling apparently had a change of heart. Years later, Oliver Wendell Holmes, Jr., was said to have expressed regret for ever having signed

censorship lasted until 1948. The *Mutual Film* opinion was not actually overturned until 1952.<sup>231</sup>

Up until 1948, the assertion that films were a form of speech entitled to First Amendment protection was not seriously challenged. The Supreme Court addressed the matter with little issue. "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."<sup>232</sup> The very foundation of the *Mutual Film* opinion was repudiated, although *Mutual Film* was not cited.

However, the Court returned to the issue of film classification in *Joseph Burstyn, Inc. v. Wilson*,<sup>233</sup> where the Court reviewed the rationale behind *Mutual Film*. The first reason proposed by plaintiff to deny First Amendment protection was that the content of films was merely entertainment. The Court rejected this argument on both factual and logical grounds. Factually, the Court rejected the characterization of films as primarily entertainment, stating that "[i]t cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."<sup>234</sup> The Court also challenged the logic of distinguishing between entertainment and information when trying to shape opinion. "The line between the informing and the entertaining is too elusive for the protection of that basic right—a free press. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."<sup>235</sup>

The second reason proposed by plaintiff to deny First Amendment protection to films was the commercial nature of the enterprise. The Court dismissed this argument as well, pointing out that books, newspapers, and magazines all share this trait.<sup>236</sup>

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his name to the *Mutual Film* opinion.").

231. *LIVELY*, *supra* note 229, at 10; *see also* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

232. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). In this case, the Department of Justice brought suit against Paramount and the other major studios for violations of §§ 1 and 2 of the Sherman Act relating to the methods used to exhibit the motion pictures. The Court acknowledged the First Amendment right to exhibit motion pictures but said that the First Amendment did not make the studios immune from the civil and criminal penalties imposed by the Sherman Act.

233. 343 U.S. 495 (1952).

234. *Id.* at 501.

235. *Id.* (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)).

236. *Id.* at 501–02.

Finally, the Court addressed the primary reason behind the *Mutual Film Court*'s decision to regulate films—the immorality that films can generate.<sup>237</sup> The plaintiff argued that “motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression.”<sup>238</sup> The Court did not entirely reject the premise of this argument, but rather rejected the threat of evil as sufficient grounds to allow for unbridled censorship.<sup>239</sup> The Court explained that “[i]f there be capacity for evil it may be relevant in determining the permissible scope of community control . . . .”<sup>240</sup> The statement acknowledged that not all films or even all forms of speech are entitled to absolute protection from censorship; rather, the content of speech can be reviewed to find those instances when its merit is so minimal that the speech falls below any constitutional protection. The Court's language anticipated one of the prongs in the landmark pornography decision *Miller v. California*.<sup>241</sup>

The *Miller* Court looked to *Burstyn*, along with *Roth v. United States*<sup>242</sup> and *Memoirs v. Massachusetts*,<sup>243</sup> before it created the three-prong test used to determine whether a film or other piece of communication was

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237. *Mutual Film Corp. v. Industrial Comm'n*, 215 F.138, 240 (N.D. Ohio 1914).

Films of a “moral, educational or amusing and harmless character shall be passed and approved” are the words of the statute. No exhibition, therefore, or “campaign” of complainant will be prevented if its pictures have those qualities. Therefore, however missionary of opinion films are or may become, however educational or entertaining, there is no impediment to their value or effect in the Ohio statute. But they may be used for evil, and against that possibility the statute was enacted. Their power of amusement and, it may be, education, the audiences they assemble, not of women alone nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy purpose. Indeed, we may go beyond that possibility. They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to. Besides, there are some things which should not have pictorial representation in the public places and to all audiences.

*Id.* at 241-242.

238. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

239. *Id.*

240. *Id.*

241. 413 U.S. 15 (1973).

242. 354 U.S. 476 (1957).

243. 383 U.S. 413 (1966). Prior to *Miller*, the Court adopted a much lower standard for what fell within the First Amendment penumbra. The *Memoirs* three-prong test was as follows:

[I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

*Id.* at 418.

outside the scope of the First Amendment on the basis of obscenity.<sup>244</sup> The constitutional standard, as articulated in *Miller*, balances the concerns over prurient content discussed in the *Mutual Film* opinion and the applicability of community standards presented in *Burstyn* with the broader grant of protection for film afforded in *Paramount Pictures* and in *Burstyn*.

Since *Burstyn*, there is no doubt that the medium of film falls squarely within the First Amendment. The issue of where to limit constitutional protection turns on the content presented in the film, not the celluloid on which it is printed.

No court has taken the next step in addressing whether filmmaking is afforded the same protection as film exhibition. In *Mutual Film*, *Burstyn*, and other cases involving motion pictures, the issue turned on various attempts to review the film prior to exhibition or to stop the exhibition once it had begun. In fact, the question of whether filmmaking is protected by the First Amendment has only been addressed in the context of filming pornographic movies. In *People v. Freeman*,<sup>245</sup> the California Supreme Court overturned a pandering conviction against Freeman for soliciting and paying actors to engage in sex acts for a movie that the State admitted was not "obscene" under the *Miller* test. The California Supreme Court first found that payment to the actors was not covered by the criminal statute,<sup>246</sup> and went on to discuss the First Amendment considerations that would be created by the suggested interpretation of the statute.<sup>247</sup> The court rejected the argument that "there is a distinction between 'speech' (e.g., a film), which is constitutionally protected under the First Amendment so long as it is not obscene, and 'conduct' (the making of the film), which may be prohibited without reference to the First Amendment."<sup>248</sup> As a result, the California Supreme Court held that the making of a film is entitled to the same level of First Amendment protection as the exhibition of that film.

The corollary should be equally true. Filmmaking will receive no greater protection from the First Amendment than will the exhibition of the

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244. *Miller*, 413 U.S. at 23.

The basic guidelines for the trier of fact must be: (a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* at 24 (citations omitted).

245. 46 Cal. 3d 419 (1988).

246. *Id.*

247. *Id.* at 425.

248. *Id.* at 426-27.

finished film. If the content of the film is not protected under the First Amendment, then neither is the creation of the film. So long as the making of the film remains part of the protected speech, however, First Amendment concerns must be addressed when regulating the activities necessary to make the film.

### 1. Incidental Restrictions and the Standard of Review

The mere fact that filmmaking is speech does not mean that all film permit ordinances must be declared unconstitutional or that filmmakers have greater rights than others to use public and private property. The recognition that film production is a form of speech simply means the ordinances must not violate the rights of the filmmaker.

The legality of the ordinance will depend on a number of factors, beginning with the purpose of the regulation. Initially, the law must establish the level of scrutiny appropriate for use by the courts in reviewing the film ordinance. Broadcast television and cable are held to a different standard than that of print media.<sup>249</sup> Film production is more closely analogous to publishing and newspapers in that no filmmaker's production will preclude another from trying to communicate with the public.<sup>250</sup> The scarcity of broadcast bandwidth, which the Supreme Court uses as the basis for upholding governmental regulation of broadcast and cable content, simply does not exist in motion picture production, nor does it have any reasonable analog.<sup>251</sup> Anyone with a camera can compete in the marketplace. Thus, content-based regulation for film, such as newspapers, would be subject to the highest standards of scrutiny. "[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."<sup>252</sup>

If the ordinance is designed to discourage speech or filming because of its content, the regulation would "presumptively violate the First

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249. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386-90 (1969).

250. Scott Lewis Landsbaum, Note, *How to Censor Films Without Really Trying: The Beirut Agreement and the Foreign Agents Registration Act*, 62 S. CAL. L. REV. 685, 723 (1989).

251. *Id.*

252. *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2458-59 (1994) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citations omitted).

Amendment.”<sup>253</sup> Filmmakers who find themselves subject to a range of possible regulations based on the content, theme, or subject matter of their films may challenge the legality of the ordinance. The jurisdiction would have to establish that the law was “narrowly tailored to a compelling state interest.”<sup>254</sup> Any law that burdens speech will only be enforced if it is “in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored.”<sup>255</sup> Beyond the category of obscene speech,<sup>256</sup> there are few areas in which the government can effectively regulate the content of speech involved with filmmaking. Burning a flag,<sup>257</sup> lighting a cross,<sup>258</sup> or wearing and displaying a swastika<sup>259</sup> for the purpose of making the film are beyond the law’s reach.

If it is assumed that the ordinance is drafted to govern specific conduct unrelated to the content of the speech, then the starting point in the analysis is that the film ordinance must be a reasonable time, place, and manner regulation.<sup>260</sup> Laws focused on conduct unrelated to speech do not face the same level of scrutiny before the courts. “In contrast [to content restrictions], regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.”<sup>261</sup> So long as the film permit ordinance is content-neutral, then time, place, and manner regulations may be acceptable. Such regulations must be designed to serve a substantial governmental interest

253. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986).

254. *Turner Broad. Sys.*, 114 S. Ct. at 2478; *see also* *Boos v. Barry*, 485 U.S. 312, 321 (1988).

255. *Riley v. National Fed’n of the Blind*, 487 U.S. 781, 800 (1988) (striking down mandatory disclosure of charitable solicitor’s professional status and regulating fees paid to professional fund-raisers).

256. *See, e.g.*, *Roth v. United States*, 354 U.S. 476, 485 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *see also* *Miller v. California*, 413 U.S. 15, 39 (1973).

257. *Johnson*, 491 U.S. at 420 (holding Texas law banning desecration of the flag unconstitutional).

258. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (holding law criminalizing cross burning as a form of unprotected “fighting words” was unconstitutionally overbroad).

259. *Id.*

260. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (“The ‘time, place, or manner’ test was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a ‘public forum,’ although we have on at least one occasion applied it to conduct occurring on private property.”).

261. *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994).

and must "not unreasonably limit alternative avenues of communication."<sup>262</sup>

The legal standard for reviewing the reasonableness of such ordinances stems from *United States v. O'Brien*,<sup>263</sup> which articulated a four-prong test for regulating conduct as a form of speech.<sup>264</sup> O'Brien was convicted of mutilating his draft card when he burned the card on the steps of the South Boston Courthouse. In upholding O'Brien's conviction, the Court articulated standards for regulating conduct that had the effect of also serving as speech:

This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling, substantial, subordinating, paramount, cogent, strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>265</sup>

The concerns for local convenience, fire protection, and public safety are good examples of the types of content-neutral concerns that jurisdictions may properly regulate.<sup>266</sup> Such regulations are

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262. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

263. 391 U.S. 367 (1968).

264. *Id.* at 377. The distinction between the reasonable time, place, and manner restrictions and the *O'Brien* test have been held not to differ substantially. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984).

265. *O'Brien*, 391 U.S. at 376-77; see also *People v. Freeman*, 46 Cal. 3d 419, 427 (1989).

The factors to be considered are (1) whether the regulation is within the constitutional power of the government, (2) whether the governmental interest is important or substantial, (3) whether the governmental interest is unrelated to the suppression of free expression, and (4) whether the incidental restrictions on alleged First Amendment interests is no greater than is essential to the furtherance of the interest.

citing *O'Brien*, 391 U.S. at 377.

266. *E.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (sound levels, equipment, and staffing).

constitutionally within the powers of the city or state—the regulations are in furtherance of the important governmental interest in the safety and welfare of the residents. The regulations are, or should be, unrelated to the suppression of speech. The only limitation is that the ordinance cannot impose an undue burden on the filming. Instead, the ordinance must be tailored to address the legitimate concerns of public convenience and safety. In most cases, this means that a complete ban on filming will fail this last prong of the *O'Brien* test.<sup>267</sup> Such film ordinances must not “unreasonably limit alternative avenues of communication.”<sup>268</sup> Application of *O'Brien* requires the jurisdiction to provide an opportunity to film. An ordinance that prohibits filming altogether is likely to be deemed an unreasonable restriction on the form of communication.

By avoiding any review of the film's content and providing a reasonable means of complying with the film permit requirements, the *O'Brien* test will be met and the film ordinance will withstand constitutional challenge. Reasonableness is the key. The jurisdiction is not obligated to remove all barriers to filming—only to keep the barriers reasonably based on the needs for safety and public convenience. The restrictions do not have to be “the least intrusive means required” to serve the governmental interest; the regulation merely needs to promote a substantial government interest that would be achieved less effectively absent the regulation.”<sup>269</sup> Safety concerns, traffic issues, neighborhood privacy, and other legitimate concerns of the jurisdiction can all be addressed within the constitutional framework.

## 2. Use of Private and Public Lands

The First Amendment protection afforded to films and filmmaking does not require that the jurisdiction open the doors of every government-owned building. It only requires that the jurisdiction not interfere with the First Amendment rights of its residents on their private property<sup>270</sup> and on government property available to the public.<sup>271</sup> As landlords,

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267. *But see* *United States v. Kokinda*, 497 U.S. 720 (1990) (plurality opinion) (upholding complete ban on soliciting on sidewalk of post office).

268. *See* *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

269. *Ward*, 491 U.S. at 798-99 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)); *see also* *Clark*, 468 U.S. at 297.

270. *See generally* *Renton*, 475 U.S. at 45-47 (upholding the constitutionality of an ordinance prohibiting the operation of adult theaters near residential areas because it did not impose a blanket ban on theaters).

271. *Kokinda*, 497 U.S. at 726; *Ward*, 491 U.S. at 799; *see also* *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).



governmental agencies are subject to requirements that are not the same as those pertaining to private individuals. While a private person or corporation may summarily refuse any request to film on that particular property, the government must temper its responses so that it is not "unreasonable" or "arbitrary, capricious, or invidious," even when refusing to give permission to use property that is not generally open to the public.<sup>272</sup> The government will not be held to the same level of First Amendment scrutiny for nonpublic land and buildings as when the government is trying to regulate a public forum.<sup>273</sup> For nonpublic areas, the standard is much lower than the strict scrutiny required for regulating land open for public use, such as parks and sidewalks.<sup>274</sup> The result of this lower standard is to allow local jurisdictions to choose whether or not to allow filming on different properties owned by the jurisdiction, so long as reasonable choices are made in the policy.

For constitutional purposes, government-owned and controlled property falls into three broad categories. Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny. "Regulation of speech on property that the government has expressly dedicated to speech activity is also examined under strict scrutiny. However, regulation of speech activity where the property is neither open to the public nor dedicated to First Amendment activity is examined only for reasonableness."<sup>275</sup>

The characterization of the nature of the property ultimately results in two different standards. When the property is not generally open to the public because it has neither been dedicated as a limited public forum (like a community hall or a campus auditorium open to the public) nor served as a traditional public forum (like the parks and sidewalks), then the standard need only be one of reasonableness.<sup>276</sup> Restrictions are permissible so long as they are "not an effort to suppress expression merely because public officials oppose the speaker's view."<sup>277</sup> Prohibiting filming in local courthouses or jail facilities is reasonable based on the needs for security and decorum. Similarly, using the local sheriff's station only on evenings

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272. *Kokinda*, 497 U.S. at 726 (quoting *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974)).

273. *Id.*

274. *Id.*

275. *Id.* at 727 (citing *Perry*, 460 U.S. at 46).

276. *Kokinda*, 497 U.S. at 727; *Perry*, 460 U.S. at 46.

277. *Perry*, 460 U.S. at 46; see also *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985).

and weekends would be entirely reasonable because such a restriction would avoid any interference with the operation of the department. Even restrictions as to subject matter would be upheld in the nonpublic forum, so long as they are viewpoint-neutral.<sup>278</sup> For example, limiting filming in a local zoo to projects dealing with the animals may be acceptable. On the other hand, allowing filmmakers to use prison facilities only if the project endorses (or opposes) capital punishment would be based on viewpoint, thus violating even the lowest standards of reasonable regulation for the limited public forum.<sup>279</sup> Again using the local zoo as an example, a requirement that the animals be treated properly is a reasonable exercise of police power. Limiting the subject matter to the animals may be reasonable since the forum is operated to focus attention, education, and awareness on the animals. However, providing the zoo only for projects that endorse a ban on the use of animal-based product testing would become a viewpoint based restriction in violation of the First Amendment. Requiring a review of the script as a condition of filming may not violate the First Amendment if it is a review of the material for the reasonable, viewpoint-neutral restrictions appropriate to the jurisdiction. Basing the decision to allow filming on the review of the script because of its content alone or to allow the unfettered discretion of the permit officer would fail a test of reasonableness and be deemed arbitrary and capricious.<sup>280</sup>

Unlike nonpublic property, regulation of speech in traditional public fora and those properties dedicated to the public is reviewed under the standard of strict scrutiny. Streets and parks, for example, "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."<sup>281</sup> In regulating the use of the property, content-neutral restrictions are acceptable so long as they are limited to time, place, and manner restrictions that are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."<sup>282</sup> The rules regarding the use of

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278. *Cornelius*, 473 U.S. at 806 ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions are reasonable in light of the purpose served by the forum and are viewpoint neutral.").

279. *E.g.*, *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 46.

280. *See Kokinda*, 497 U.S. at 726-27; *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974).

281. *Perry*, 460 U.S. at 45 (citing *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939)).

282. *Id.* (citing *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981)); *see also Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535-36 (1980).

parks or other property may impose only incidental burdens on speech that are contemplated under *O'Brien*.

The same standard applies to any fora voluntarily opened to the public by the government. Once created, the government cannot impose restrictions on that forum any more so than on parks, streets, or sidewalks.<sup>283</sup> The legal standard is no different in the limited public forum than in the traditional public forum. This has been held true for university meeting facilities,<sup>284</sup> school board meetings,<sup>285</sup> municipal theaters,<sup>286</sup> and an interschool mail system.<sup>287</sup> A factual distinction does exist, however, between the traditional public forum and the government-created limited public forum. "In a limited public forum, . . . the need to confine expressive activity on the property to that which is compatible with the intended uses of the property will be a compelling interest that may justify distinctions made between speakers."<sup>288</sup> Once a compelling need is recognized, the government may choose to select among speakers so long as the choice does not advance a particular viewpoint.<sup>289</sup>

Thus, with a limited public forum, speech can be regulated so that it does not interfere with the ongoing activities of the property. For example, the interschool mail system remains a mail system and the school board meetings remain meetings for school board-related issues. That limitation, however, cannot be used to promote one point of view over another. Similarly, when a public building such as a courthouse or fire station becomes a regular film location, that facility must be open on an equal basis to all applicants who meet the same content-neutral, minimum safety standards. The standards must not discriminate or favor a film, point of view, or filmmaker. The content-neutral restriction must be reasonable and well-tailored to the jurisdiction's interest in public safety and convenience and must not be unduly burdensome.

For permits in public fora like parks, streets, or other popular film locations, the decision to grant permits must be content-neutral and based on the jurisdiction's compelling interest in public safety and convenience.

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283. *Widmar v. Vincent*, 454 U.S. 263 (1981).

284. *Id.* at 279 n.2 (Stevens, J., concurring).

285. *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976).

286. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

287. *Perry*, 460 U.S. at 46.

288. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 819 (1985) (Blackmun, J., dissenting).

289. *E.g., International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 676-77 (1992); *Perry*, 460 U.S. at 46.

The limitations imposed by the permit must be narrowly tailored to meet these needs and should be designed in such a way that they are not an undue burden on the filmmaker. For permits to film on other property owned by the government and used intermittently for filming, like prisons, offices, and similar nonpublic property, the decision whether to grant or deny permission must still be reasonable, not arbitrary and capricious, nor based on the viewpoint or ideas espoused by the applicant. If these standards are met, the granting or denial of a permit should survive a constitutional challenge.

### 3. Reasonable Guidelines Necessary for Permit Application

The requirement that the decision granting or denying access not be arbitrary also serves to limit the language of the permit ordinance itself. A permit ordinance that allows the permit-granting agent power to grant or deny a permit without explicit, reasonable, and neutral guidelines will also be deemed unconstitutional.<sup>290</sup> This guideline will apply both to the permit-granting authority and to the reservation of the permitting agent's right to add terms to the permit.<sup>291</sup>

In *City of Lakewood v. Plain Dealer Publishing Co.*,<sup>292</sup> a local ordinance gave the mayor power to grant or deny permits to erect newspaper kiosks.<sup>293</sup> The language of the kiosk ordinance was similar to typical film permit ordinances.

[The] ordinance gives the mayor the authority to grant or deny applications for annual newsrack permits. If the mayor denies an application, he is required to "stat[e] the reasons for such denial." In the event the mayor grants an application, the city issues an annual permit subject to several terms and conditions. Among them are: (1) approval of the newsrack design by the city's Architectural Board of Review; (2) an agreement by the newsrack owner to indemnify the city against any liability arising from the newsrack, guaranteed by a \$100,000 insurance policy to that effect; and (3) any "other terms and conditions deemed necessary and reasonable by the Mayor."<sup>294</sup>

Although the public convenience and interest in an aesthetically pleasant city was deemed a reasonable governmental interest, the Court held the

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290. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988).

291. *Id.* at 770.

292. *Id.*

293. *Id.* at 753.

294. *Id.* at 753-54 (footnotes omitted).

ordinance unconstitutional because it lacked articulated standards and granted unfettered discretion to the mayor.<sup>295</sup> The requirement that the mayor state the reasons for the denial did not change the arbitrary nature of the mayor's power.<sup>296</sup> In addition, the power to add conditions further expanded the arbitrary nature of the regulation.<sup>297</sup>

Film permits may readily be drafted with these same constitutional infirmities. The standards of public convenience and safety can be set out in the ordinance, and the denial of a permit can be limited to those uses that would materially inconvenience the community or pose a safety risk to the production company, to private or public property, or to bystanders. So long as the ordinance is tailored to these concerns, it will be enforceable.<sup>298</sup>

One such concern is that the ordinance or the permitting authority not attempt to support only those projects that portray the jurisdiction in a positive manner. In *Schacht v. United States*,<sup>299</sup> an actor was charged with violating a federal law prohibiting the unauthorized wearing of a military uniform in contravention of a federal statute. The statute had an exception that allowed that "[w]hile portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force."<sup>300</sup> The Supreme Court held that even though a blanket prohibition banning the wearing of the uniform would survive the four-prong *O'Brien* test, the limitation on the statutory exception made the law unconstitutional.<sup>301</sup> The Court's explanation applies to any rule that seeks to encourage positive portrayals and images.

An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance. The last clause of § 772 (f) denies this constitutional right to an actor who is wearing a military uniform

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295. *Id.* at 772.

296. 486 U.S. 750, 769 (1988) ("Indeed, nothing in the law as written requires the mayor to do more than make the statement 'it is not in the public interest' when denying a permit application.").

297. *Id.* at 770.

298. *But see* *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (holding that an ordinance eliminating kiosks for commercial leaflets but not newspapers was unconstitutional because it was not a reasonable fit to the city's interest in safety and aesthetics).

299. 398 U.S. 58 (1970).

300. *Id.* at 59–60 (quoting 10 U.S.C. § 772(f) (1970) (emphasis omitted)).

301. *Id.* at 61–63.

by making it a crime for him to say things that tend to bring the military into discredit and disrepute.<sup>302</sup>

Unfortunately, the threat of such a ruling is that the blanket prohibition, since it is content-neutral, will be adopted by the jurisdiction, and nonpublic fora will be put off limits out of fear that someone will use the area or facility in a negative manner. While such a result is bad for relations with film productions and contrary to the goal of increasing economic opportunity, it may not be illegal, unless the film company could establish that the predominant reason for the change was censorship.

In addition to the *Schacht* opinion, another military policy also suffers from this constitutional infirmity. Occasionally, the DoD and the offices of various military branches provide filmmakers assistance in the production of various projects. For the filmmakers who receive this assistance, priceless equipment, locations, and technical advice may be available.<sup>303</sup> However, to receive this assistance, the request must comply with the applicable provisions of DoD regulations.<sup>304</sup>

It is DoD policy that:

1. Government assistance may be provided to an entertainment-oriented motion picture, television, or video production when cooperation of the producers with the Government results in benefiting the Department of Defense or when this would be in the best national interest, based on consideration of the following factors:
  - a. The production must be authentic in its portrayal of actual persons, places, military operations, and historical events. Fictional portrayals must depict a feasible interpretation of military life, operations and policies.
  - b. The production is of informational value and considered to be in the best interest of public understanding of the U.S. Armed Forces and the Department of Defense.

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302. *Id.* at 63.

303. Rod Lurie, *Hollywood in the Trenches: Toeing the Military Line*, EMMY MAG., Nov.-Dec. 1988, at 36.

304. DEPARTMENT OF DEFENSE INSTRUCTION 5410.16, DO D ASSISTANCE TO NON-GOVERNMENT, ENTERTAINMENT-ORIENTED MOTION PICTURE, TELEVISION, AND VIDEO PRODUCTIONS, (Jan. 26, 1988) (updating DoD Instruction 5410.16, Jan. 21, 1964) [hereinafter DO D INSTRUCTIONS].

c. The production may provide services to the general public relating to, or enhancing, the U.S. Armed Forces recruiting and retention programs.

d. The production should not appear to condone or endorse activities by private citizens or organizations when such activities are contrary to U.S. Government policy.<sup>305</sup>

It is inconceivable that any policy statement could be drafted that would further intrude into the content of a film project. Furthermore, this statement of DoD policy has content review as the first section of the instruction. Operational readiness ranks a mere third on the list.<sup>306</sup> Nor is this process passive. A production company receiving DoD assistance is required to have a military officer on location at all times to ensure that the pre-approved script is not altered during filming. If, at any time during production, the project seems to change and is no longer in the best interests of the military, the assistance can also be revoked.<sup>307</sup> Given the Supreme Court's decision in *Schacht*, no legal defense could be made to this portion of the DoD policy. Nonetheless, no challenge has ever been made, since limited accessibility is better than none.

Two issues make this policy particularly troublesome. The first issue relates to the nature of the DoD assistance. In addition to use of personnel, equipment, and locations, these policies must be met as a prerequisite to the purchase or use of any "DoD motion picture and video stock footage."<sup>308</sup> Film taken by the DoD is not even protected by copyright law,<sup>309</sup> and yet access to this public information is predicated on a showing that the footage will be used to portray the military only in a positive light.

The second troubling aspect of the DoD instruction is its application to the base conversion policies. Although military bases have been transferred to civilian authorities, the military retains some of its content control. The film commissions in California and other areas have worked out arrangements so that the DoD instruction will not fully apply to bases that have no military activity.<sup>310</sup> By leasing an entire base to the local film commission, military officials can circumvent the DoD instruction and

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305. *Id.* at C.1.

306. *Id.* at C.3 ("Operational readiness of the Armed Forces shall not be impaired. Diversion of equipment, personnel, and materiel resources shall be kept to a minimum, and shall only be on a non-interference with military operations and training basis.").

307. Lurie, *supra* note 303, at 36.

308. DOD INSTRUCTIONS, *supra* note 304, at C.10.

309. 17 U.S.C. § 105 (1976); *see also* H.R. REP. NO. 94-1476, at 58-59 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5671.

310. Goldrich, *supra* note 18, at 1.

allow filming for projects wholly unrelated to the military on the bases.<sup>311</sup> However, “projects depicting the armed forces will still face customary military review when being considered for filming at these facilities.”<sup>312</sup> This “customary military review” means that the DoD has retained the right to exclude film projects that depict the military in an unflattering light or otherwise include a viewpoint that military officers do not agree with, even from bases it no longer uses and for which property rights have been assigned.

Other than a general concern for its image, the military has no legitimate interest in the content of these productions. The relaxed rules will allow films, commercials, and television shows to depict anything from deodorant commercials to gangland killings without supervision but restrain a filmmaker from criticizing the government or showing the military in an unflattering light. Retention of content restrictions for access to stock footage and for filming at bases no longer used by the military cannot withstand constitutional challenge and should be voluntarily terminated. In any event, jurisdictions smaller or less well-armed than the DoD should not contemplate such impermissible and abhorrent restrictions.

Content restrictions are not limited to the military, however, and even some progressive communities improperly cross this line. The City of Phoenix, for example, prides itself on its simple, streamlined permit process and low permit fee. Nonetheless, a condition of the Phoenix film permit is that “[r]eference to the City of Phoenix and/or use of official City logo is prohibited on film unless written approval is granted by the Motion Picture Coordinator.”<sup>313</sup> Control of the name “Phoenix” is a direct prohibition on speech, a prior restraint that presumably will be lifted only if the content of the film is flattering for the city. This type of prior restraint has been consistently rejected by courts since 1931.<sup>314</sup> Hence, elected officials should know better than to try to stifle dissent in such an offensive, unconstitutional fashion.

First Amendment concerns also arise when a permit ordinance lacks an expeditious appeals process. Because the issuance of a permit is a form of prior restraint, the process itself will be closely scrutinized. As the Court has explained, an “ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in ‘the archetype of a

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311. *Id.*

312. *Id.*

313. CITY OF PHOENIX FILM OFFICE, FILM OR TAPE PERMIT § 3.

314. *Near v. Minnesota*, 283 U.S. 697 (1931).



traditional public forum,' is a prior restraint on speech."<sup>315</sup> Such a restraint will withstand judicial review if the process incorporates sufficient procedural safeguards. In *Freedman v. Maryland*,<sup>316</sup> the Court articulated three procedural safeguards that are necessary.

[T]o ensure expeditious decisionmaking by a motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.<sup>317</sup>

The *Freedman* decision involved a submission requirement for film exhibition that required the exhibitor to screen the film prior to public showing.<sup>318</sup> The same concern exists both for filmmaking permits and film exhibition permits: the restraint must be brief and the review expeditious. An ordinance that requires an appeal to be reviewed first by the jurisdiction's city council at the next regularly scheduled monthly meeting will fail to meet the standard because it is neither expeditious nor judicial. Jurisdictions may wish to encourage a non-judicial appeal, but such a process should be voluntary and quite expeditious. Under *Freedman*, the judicial review must also be available.

For jurisdictions seeking economic opportunity for their residents, maintenance of public safety, and minimization of any inconvenience, content restrictions are neither a concern nor a point of controversy. Print photographers, commercials, television shows, and feature films are all in the business of creating fictional entertainment; the locations serve as the backdrop. Requirements that the film permit ordinance be reasonable in approach and provide guidelines for the approval or denial of an application are not only required by constitutional mandate but are tools for good government.

#### IV. THE PROCESS OF PERMITTING AND THE ANNOTATED ORDINANCE

The goal of the ordinance is to facilitate the permit application process, filming, and coordination of services. By utilizing the ordinance as a tool for streamlining and facilitating the permit process, better relations

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315. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)).

316. 380 U.S. 51 (1965).

317. *Id.* at 58-60.

318. *Id.* at 52.

can be built between the jurisdiction and the production company. While the ordinance alone can not guarantee better results, it is a necessary first step in creating a workable film permitting program.

*A. The California Legislative Approach & the Model Act*

Since 1988, the California Legislature and the California Film Commission ("Film Commission") have attempted to implement one of the most comprehensive film permit revisions in the country. While California's approach is not unique, it serves as an excellent prototype for discussing state legislation and local ordinances necessary to develop responsive, comprehensive film permit regulations. Other jurisdictions choose to regulate film production more casually under the theory that the lack of a permit requirement will encourage production.<sup>319</sup> Even in such a jurisdiction, however, an application must be made for use of government property.<sup>320</sup>

The Film Commission provides guidance for jurisdictions attempting to create a simple and effective film permitting process:

The Legislature finds that motion picture production in California provides unique and significant contributions to the economy of California and to the cultural enrichment of its citizens, as well as providing a unique form of entertainment for the state, country, and the world at large. The Legislature finds that expenditures for hotels, catered food, leases of equipment and property, transportation, and wages and salaries paid to individuals in California as a result of motion picture production benefit the California economy directly and indirectly.

However, the Legislature finds that the significant benefits provided to California by motion picture production are in jeopardy as a result of the concerted efforts of other states and countries to lure this production away from California.

Therefore, the Legislature finds a need for concerted efforts by California state and local governments to provide an environment supportive of, and conducive to, the undertakings of the motion picture industry in this state. A key element of

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319. See, e.g., TEXAS PRODUCTION MANUAL, *supra* note 170, at 284.

320. The Texas procedure is designed to be as simple and unnoticeable as possible for the production company. "Usually, requests to film on state-owned property can be handled entirely through the Film Commission. The Film Commission staff has long-standing relationships with officials at many state agencies and organizations including Parks & Wildlife, the Department of Transportation, the State Preservation Board and the University of Texas." *Id.*

this effort is to make California as uniform as possible in the local regulation and permitting of the film industry; as close to a "one-stop permitting" approach as possible.<sup>321</sup>

The legislative goals were clearly established as a mandate for cities and counties within the state:

It is the intent of the Legislature to encourage local governments to develop uniform procedures for issuing permits and to charge fees for the use of agency property of employee services, which do not exceed the estimated reasonable costs of providing the property or services for which the fees are charged.<sup>322</sup>

The language used for cities and towns was less absolute in its demand for a one-stop film permit office because of the resistance generated by cities worried about losing local control. Instead of simply stripping cities of the power over film permits, the legislature enacted the Uniform Film Permit Act<sup>323</sup> ("UFPA") that required each jurisdiction to adopt the model process "or inform the California Film Commission in writing as to why they cannot or need not adopt this model process."<sup>324</sup> The State requirements were designed to force cities and counties to review a simple, yet comprehensive model permit and encourage them to adopt the prepared text or defend their policy for not doing so.

The UFPA provides six minimum requirements a city or county ordinance should have if the jurisdiction chooses to regulate filming.<sup>325</sup> The six subjects covered by the legislation represent the areas of greatest concern for the entertainment industry—areas where problems can develop that slow down production, add unnecessary expense, or impose unnecessary restrictions.<sup>326</sup> The California Legislature charged the Film Commission with developing a model film permit for use by California cities and counties. Since the implementation of the legislation, cities such as Long Beach have adopted the model permit with only modest changes.<sup>327</sup> A review of the six provisions illustrates the application of the legal requirements and jurisdictional needs in a working ordinance.

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321. CAL. GOV'T CODE § 14998.1 (West 1992 & Supp. 1996).

322. *Id.* § 14998.10 (West 1992).

323. *Id.* § 14999.30 (West 1992).

324. *Id.* § 14999.21 (West 1992); *see also* O.C. PERMIT GUIDE, *supra* note 172, at 16.

325. CAL. GOV'T CODE § 14999.20 (West 1992).

326. The six subjects are: responsibility in the jurisdiction; time requirements for permitting; scope of the film permit; multi-jurisdictional coordination; fees; and the content of the application form. *See id.*

327. LONG BEACH, CAL., MUNICIPAL ORDINANCES ch. 5.61 (1994).

## 1. Staffing Responsibility in the Jurisdiction

The first section of the UFPA provides that the adopted filming process contain “[a] designated person to deal with [the] industry whose responsibilities shall include but not be limited to: (1) The attraction of motion picture production to the jurisdiction. (2) Assistance in expediting to the greatest extent possible the issuances of all use permits necessary for motion picture production.”<sup>328</sup>

Perhaps no item is more fundamental to a positive, “film friendly”<sup>329</sup> environment than the designation of an individual who will handle the permitting activities. The lack of coordination within a jurisdiction can become quite costly for the production company and lead to inconsistent management from project to project. This issue was cited by SCAG as a contributing cause for runaway production. SCAG reported that “[a]n organizational factor often cited by producers is the need for the permit process to be coordinated in a way which saves time. Sometimes two location managers are hired for filming in Los Angeles—one for finding locations and one for getting permits, paying fees, getting letters of permission.”<sup>330</sup> In contrast, the marketing of competing jurisdictions begins with the convenience of a single phone call. Seattle’s “Film Seattle” pamphlet is illustrative:

One call will put you in business!

While filming in Seattle, many activities will require permits for the use of city parks, street, sidewalks, or parking. We realize time is money for you, and have appointed liaisons in city departments to guide you quickly and effortlessly through the permit process . . . . The City Film Coordinator will help coordinate your various permit needs with other city departments and help you through our process.<sup>331</sup>

The California Model Filming Ordinance (“Model Ordinance”), adopted pursuant to the UFPA,<sup>332</sup> does not expand on this need for

328. CAL. GOV’T CODE § 14999.20(a) (West 1992).

329. The term reflects pro-industry regulation and efficient management within the jurisdiction. See DEPARTMENT OF COMMERCE, MONTANA FILM OFFICE (1995) (“It is the responsibility of the Montana Film Office to *ensure that the state is ‘film friendly.’* We not only work with producers to find locations that fit their script, we also act as their liaison through every phase of production.”).

330. SCAG Report, *supra* note 99, at 12.

331. CITY OF SEATTLE MAYOR’S OFFICE OF FILM & TOURISM, FILM SEATTLE, Mar. 5, 1996 [hereinafter FILM SEATTLE].

332. See CAL. GOV’T CODE § 14999.20 (West 1992).

coordination but does provide that "[t]he issuing authority shall be the city/county designee."<sup>333</sup> However, the ordinance becomes more explicit when describing the implementation of rules and authorization of permits under the Model Ordinance:

Rules: The designated city/county officer is hereby authorized and directed to promulgate rules and regulations, subject to approval by resolution of the Council, governing the form, time and location of any film activity set forth within the city/county.

He/She shall also provide for the issuance of permits.<sup>334</sup>

As suggested above, simply naming the city manager or other designated senior officer is insufficient. The designation must be more than a formality. It must identify an individual responsible for coordinating the various departments within the jurisdiction and making the final decisions. The usefulness of the policy becomes quite clear:

Having a designated permit coordinator . . . heads off many of the problems and guarantees that correct information is given to the production company. By including the individual's name and designation on all city directories and having a back-up for the designated permit coordinator when the permit coordinator is away or unavailable will further limit problems which otherwise arise from miscommunication.<sup>335</sup>

The California Legislature was equally effective in its application of the statutory provision empowering the Film Commission to act as the permitting agent for all state-owned property.<sup>336</sup> "The director [of the Film Office] shall be the permitting authority for the use of state-owned property and state employee services for the purposes of making commercial motion pictures."<sup>337</sup> Although the director may have support staff and delegate duties within his or her office, the responsibility rests solely with that director.

## 2. Time Requirements for Permitting

The second section of the UFPA requires that the ordinance state the "[m]aximum time requirements to grant permits."<sup>338</sup> The time frame set

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333. CALIFORNIA MODEL ORDINANCE § IV.A.

334. *Id.* § III.B. Such discretion is not unfettered, however. See *infra* note 441 and accompanying text.

335. O.C. PERMIT GUIDE, *supra* note 172, at 16.

336. See CAL. GOV'T CODE § 14998.8 (West 1992).

337. *Id.* § 14998.8(a).

338. *Id.* § 14999.20(b).

forth in the ordinance should dictate a timely response. Response time is often a decisive issue in determining when and where to begin production. Production demands may require that plans be changed on short notice due to changes in weather, cast availability, and a myriad of other factors. Therefore, jurisdictions must be ready to respond.

The Model Ordinance does not actually comply with the statute on this point; however, the California Permit Code is quite explicit. The Code provides that:

The [D]irector [of the Film Office], whenever feasible, shall approve or deny any application within 24 hours. In the event that the director of the department or agency having jurisdiction over the property specified in the application permit takes no action to disapprove the application within five working days, the application shall be deemed approved by the director. If the director of the department or agency determines that he or she is unable to concur or deny an application within five working days and so notifies the director within five working days of the application, the director shall then have a total of 10 days from receipt of the application to deny the application. In the event no action is taken by the director within the 10-day period, the application shall be deemed approved by the director.<sup>339</sup>

The California Permit Code sets out the aspirational goal of twenty-four hours or less for turnaround for most productions, and also provides a mechanism for dealing with longer periods, when applicable.<sup>340</sup> For many permit applications, there is no practical reason for delay. "Many permits can and should be processed at the desk or by fax immediately, because the requests do not require traffic control, police or fire management."<sup>341</sup> The ordinance should empower the permitting agent to respond immediately and affirmatively to the request—not create obstacles. The turnaround time should be proportional to the time it takes to submit the request. Simple requests should receive swift responses.

The California Permit Code is also well-drafted because it does not automatically grant the permit after five days. Instead it allows for automatic approval only if "the director of the department or agency having jurisdiction over the property specified in the application permit takes no action to disapprove the application within five working days."<sup>342</sup> This

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339. *Id.* § 14998.8(f).

340. *Id.*

341. O.C. PERMIT GUIDE, *supra* note 172, at 8.

342. CAL. GOV'T CODE § 14998.8(f).

provision protects both the Director of the Film Office and the applicant because it precludes a department head who is not supportive of filming from interfering by simply doing nothing. If reasonable objections are raised regarding the filming, those objections will constitute sufficient actions to stall the issuance of a permit.<sup>343</sup> On the other hand, certain film permit applications will necessarily take more than one day. These may include road closures, large pyrotechnic effects, and other activities that require supervision by the police, fire, or planning departments.

In addition, other tools can be employed to further facilitate the application process. For example, applications submitted by fax should be acceptable.<sup>344</sup> A requirement that the permit application be hand-delivered serves no legal purpose and only adds to the cost of the application process. Many jurisdictions have already implemented policies to accept permits by fax.<sup>345</sup> To further speed the process, the EIDC (of Los Angeles) and New York City both offer permit forms on a fax-back service so the production companies have twenty-four hour access to the forms.<sup>346</sup>

Another stumbling block is the form of payment. To facilitate the payment process, cities should accept payment by credit card. Furthermore, new technologies like electronic mail and the Internet also provide new opportunities to provide twenty-four hour, worldwide access to the jurisdiction's permit office.<sup>347</sup> Increasingly, the use of the World Wide Web is regarded as a marketing tool for locations that provide instant access to photographs and descriptions of a jurisdiction's locations.<sup>348</sup>

A second issue related to the "maximum time requirements" is the amount of lead time necessary for the jurisdiction to consider a permit. The Model Ordinance provides an exemplary provision:

ADVANCE NOTICE FOR APPROVAL: An applicant will be required to submit a permit request at least one working day prior to the date on which such person desires to conduct an

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343. *But see* Freedman v. Maryland, 380 U.S. 51, 58–60 (1965).

344. This may be made contingent on a requirement that the final approval of the permit is subject to receipt by the jurisdiction of an original copy of the proof of insurance.

345. Offices that accept fax applications include New York, Los Angeles, Seattle, and Miami (Metro-Dade County).

346. A "fax-back" service allows the caller to provide the phone number of her fax machine to an automated service, which then sends the caller the requested form or forms.

347. *See* Goldrich, *supra* note 159, at 38 (New software recently developed for the EIDC has been described as "a Windows-type setup that will incorporate 'a detailed, in-depth compilation of everything that goes into a film permit.' Online—or in person at the Hollywood office—producers and location managers will be able to access the city/county film system for location information and permits.").

348. Anne Collier, *Cyberspace Sets the Scene*, LOCATIONS, Aug.–Oct. 1995, at 42.

activity for which a permit is required. If such activity interferes with traffic or involves potential public safety hazards, an application may be required at least two working days in advance.<sup>349</sup>

The purpose of the section reflects the optimistic view that the permit approval will be ready within the allotted time of one or two days. For projects that have no traffic impact nor any public safety problems, there is no legitimate need for lengthy advance notice. In fact, even the one day requirement may be inefficient. For example, if the clouds move along the coastline making one city's beach much more attractive than another because of the lighting, a still photographer with minimal crew should be able to receive a permit over the counter—while the light is still good. Conversely, the suggestion that projects involving public safety hazards need only two days advance notice is unrealistic.

Alternatively, the ordinance or policy could allow filming to begin immediately upon approval of the permit application or at a later time designated in the permit. A provision like that in the Model Ordinance should be written with permissive language that encourages the applicant to submit the request one or more days in advance of actual filming. A combination of the Model Ordinance provision and the California Permit Code provision should satisfy all these concerns.

### 3. Scope of the Film Permit

This section focuses on the role of the permit itself:

Permits shall be valid for the period of time necessary to film a specific shot or sequence of shots. Minor additions, corrections or alterations to a permit shall be made available by way of application for a 'rider.' Significant changes to the original permit shall require a new permit application.<sup>350</sup>

This language can be used directly by the jurisdiction for its film ordinance. As described in the police and fire guidelines, the permit is a contract between the jurisdiction and the production company that grants the production company limited rights to use the location.<sup>351</sup> Those rights and limitations should be explained in the permit. The limits will include the time period for filming, specific locations, and rules of production.

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349. CALIFORNIA MODEL ORDINANCE § VI.1.

350. CAL. GOV'T CODE § 14999.20(c) (West 1992).

351. ENFORCEMENT GUIDELINES, *supra* note 191, at 1.



Although the permit is designed to be strictly adhered to, some variation will inevitably become necessary once filming begins. The enforcement personnel, such as the fire safety officer, should be instructed to be flexible in using her discretion to get the filming shot without compromising the need for safety.<sup>352</sup> The directions provided to law enforcement personnel are equally applicable to others regulating the enforcement of the film permit, including the permitting agent. When the production company "ask[s] you if they can do something not written into the document, use your discretionary authority to approve or deny their request. Weigh safety factors, inconvenience to the public and conditions of the filming site before deciding."<sup>353</sup>

Incidental changes do not need to be documented. Riders can be used to conform the permit to slightly greater deviations, but significant changes will need additional staff review. An experienced permitting officer will be able to decipher the magnitude of the requests and gauge the potential impact, grant the changes where appropriate, and assist in finding other solutions when the original requested changes are unacceptable to the jurisdiction. Under these conditions, production can proceed relatively unimpeded.

Neither the Model Ordinance nor the California Permit Code addresses this point directly. Instead, both regulations rely on the implied discretionary power of the permitting agent. The power to grant the permit carries with it the implied power to amend the permit. While it may be preferable to have this power explicitly stated in the ordinance, the permitting agent, like other government officers, necessarily has those powers that are incidental to carry out the permit ordinance, and all those powers need not be detailed in full.

#### 4. Multi-Jurisdictional Coordination

The fourth section of the UFPA calls for "[c]oordinati[on] of multijurisdictional filming."<sup>354</sup> This provision properly refers to the need for neighboring communities to work together, but it also implies the intra-jurisdictional coordination necessary between the various departments within a city or county. Fewer separate requests and reviews avoid unnecessary delay, confusion, and conflicting requirements.<sup>355</sup> Since Southern California is composed of hundreds of jurisdictions, coordination

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352. FIRE PROTECTION HANDBOOK, *supra* note 207, at 4.

353. *Id.*

354. CAL. GOV'T CODE § 14999.20(d).

355. Goldrich, *supra* note 159, at 38.

may be as daunting a challenge as any motion picture special effect. The filming of a thirty-second car commercial may require nothing more than a car traveling at posted speeds down a scenic road. If that road happens to cross city or county lines, the requirements imposed as a condition of filming may change in the middle of the shot.<sup>356</sup> Because the Los Angeles area has over eighty jurisdictions and Orange County has an additional thirty-two, the regulations can become unbearable.<sup>357</sup> Thus, the concerns of the California legislature were well-founded.

The multi-jurisdictional problem illustrates an additional issue. The parking lot used as the base camp to park the larger trailers and other equipment "may be several hundred yards or more away because [the location] is on a site that is inaccessible to the larger production vehicles."<sup>358</sup> If the distance includes a city border, two separate film permits will be necessary to conduct the filming. In addition, if the jurisdiction limits safety personnel to its own off-duty staff, then duplication of safety staff may occur; worse yet, safety personnel involved in one aspect of the pyrotechnics or special effects may lose jurisdiction over another aspect of that same effect, jeopardizing public safety.

To solve this problem, "elected officials must provide leadership and guidance to the permit coordinator and other departments that respecting the permit process of neighboring jurisdictions is not only appropriate but required."<sup>359</sup> For jurisdictions that have this problem, language should be included in each local ordinance to allow the valid permit of an abutting jurisdiction to be valid when a location includes both jurisdictions. To protect itself, each jurisdiction can require that it receive protection through applicable insurance. Each jurisdiction must also recognize that the police and fire personnel of the other community are sufficient to provide adequate safety supervision, if such supervision is required for traffic control or special effects.

Many regions outside California pride themselves on the one-stop permit approach and the efficiency it provides. Orlando, for instance, has

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356. Robert Hofler, *Los Angeles: the City as Soundstage; Location Shooting in Los Angeles; Filming on Location: Tales in Two Cities*, BACK STAGE, July 30, 1993, at 1.

Within a short two-mile stretch, the production could take a film crew from the County of Los Angeles, which is one jurisdiction, to the City of Los Angeles, which is another jurisdiction, to Santa Monica, which is yet another jurisdiction. "You would have three separate rules for police, for fire, for parking . . ." Is it any wonder filmmakers are so often called madmen?

*Id.*

357. *Id.*

358. LOCATION SCOUTING, *supra* note 69, at 127.

359. O.C. PERMIT GUIDE, *supra* note 172, at 17.

integrated all permit and control provisions into the Metro Orlando Film and Television Office.<sup>360</sup> Miami has done the same,<sup>361</sup> as has Seattle,<sup>362</sup> and many other jurisdictions. Within California, San Diego has become a model jurisdiction, integrating city, county, and port permitting process, eliminating fees, and utilizing other streamlining mechanisms.<sup>363</sup>

Although the California legislature backed away from a mandatory one-stop approach, it still equates a one-stop film permit office with "an environment supportive of, and conducive to, the undertakings of the motion picture industry. . . ."<sup>364</sup> Without diminishing the legitimate concerns involving local control, city and county governments would benefit by sharing the control over a single permitting entity rather than duplicate efforts and create unnecessary boundaries.<sup>365</sup> Whether the permitting agency is housed in a state department or operated as an independent nonprofit corporation, the result would be the same as long as local concerns were addressed and the permitting agent was appropriately responsive to the needs of the jurisdictions served.

If the jurisdictions do not have the political will to trust one another and create a unified film office, a reciprocal relationship provides a reasonable alternative. Production companies filming across jurisdictions should only be required to complete one application, and the primary jurisdiction, as determined from the requested use, should provide the necessary approvals and supervision for the entire location. Although this process will not eliminate as many barriers as the one-stop permit office, it will be more effective in maintaining public safety and providing for the local economic opportunity generated by the filming than will separate,

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360. METRO ORLANDO FILM AND TELEVISION OFFICE, ORLANDO FILMBOOK 27 (1995).

361. See DADE COUNTY FINAL REPORT, *supra* note 80, at 3.1.

362. FILM SEATTLE, *supra* note 331.

363. SAN DIEGO FILM COMMISSION, FILM & VIDEO RESOURCE GUIDE 1 (1996) [hereinafter SAN DIEGO FILM GUIDE].

364. CAL. GOV'T CODE § 14998.1 (West 1992 & Supp. 1996)

Therefore, the Legislature finds a need for concerted efforts by California state and local governments to provide an environment supportive of, and conducive to, the undertakings of the motion picture industry in this state. A key element of this effort is to make California as uniform as possible in the local regulation and permitting of the film industry; as close to a "one-stop permitting" approach as possible.

*Id.*

365. This conclusion was made by the Los Angeles City Council and Los Angeles County Board of Supervisors. See Goldrich, *supra* note 159, at 38 ("The rationale was simple: Encourage the lucrative filming business by cutting red tape for producers, particularly those with projects that entail shooting in multiple Southland jurisdictions. The idea had undeniable merit, so much that it was repeatedly denied in the often nonsensical world of local bureaucracy.").

inconsistent regulations imposed by neighboring cities that refuse to work together.

In addition to the inter-jurisdictional coordination, the intra-jurisdictional issues should also be addressed by the permit ordinance. Various departments within the jurisdiction may find themselves struggling against each other for their common purpose. The permitting agent who has responsibility for issuing the permit should also have the authority to determine which departments should be contacted for their input and review prior to granting the permit request. Integrated permit offices in areas such as San Diego, Miami, Seattle, New York City, and Orlando use this approach. The Orlando description is illustrative. "The Metro Orlando Film and Television Office cuts red tape by acting as the liaison for most city and county services relating to the production, for instance, police assistance for traffic or crowd control, the fire department for supervision of pyrotechnic effects, and other related city and county services."<sup>366</sup>

By coordinating within the jurisdiction, many of the conflicts and delays can be eliminated. San Diego achieves this same result with a slightly different paradigm. San Diego grants permits orally rather than in written form,<sup>367</sup> and a "roundtable meeting" is used to involve the various departments.<sup>368</sup> Depending on the scope of the production, the roundtable meeting will include "[a] representative from the [San Diego] Film Commission, Fire, Police, Sheriff, CHP, Posting for no parking, and other representatives when applicable."<sup>369</sup> "When applicable, the Stunt Coordinator, Special Effects, Pyrotechnician and Director will also attend."<sup>370</sup> Although this approach appears to be more protracted than a paper permit, the increase in production spending from \$12 million in 1990 to \$50.2 million in 1995 reflects San Diego's success.<sup>371</sup>

These models of streamlined film permitting do not suggest the elimination of any key departments' review in the film permitting process. Rather, these models reflect a concern that the proper departments be involved only when necessary.<sup>372</sup> "While maintaining public safety and local convenience, police, fire, planning and public works departments may

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366. METRO ORLANDO FILM AND TELEVISION OFFICE, ORLANDO FILMBOOK, *supra* note 360, at 27.

367. SAN DIEGO FILM GUIDE, *supra* note 363, at 1.

368. *Id.* at 4.

369. *Id.*

370. *Id.*

371. SAN DIEGO FILM COMMISSION, ECONOMIC IMPACT OF PRODUCTION COMPANY SPENDING (1995).

372. SAN DIEGO FILM GUIDE, *supra* note 363, at 4.

all have a role to play in reviewing permits at times, not every department should be involved in each permit."<sup>373</sup>

As described above, the review by police and fire personnel is critical to the successful operation of productions involving street closures, pyrotechnics, crowd control, or other special effects.<sup>374</sup> Each city's or county's permitting agent should be able to review the permit application to determine whether such assistance by fire or police is necessary. If the request is truly extraordinary, such as a request that a public park's landscaping be permanently altered, then the permitting agent should bring the jurisdiction's appropriate department into the review process.

The critical link in the process is the permitting agent's ability to make these determinations as part of the agent's authority to issue permits. It serves no legitimate governmental interest for a city to require each out-of-town or out-of-state film company to traverse the byzantine labyrinth of local government simply so that each department can sign off and acknowledge that such department has no interest in the particular permit application.<sup>375</sup> Such a process wastes local governmental resources without providing any meaningful public benefit. The California Legislature recognized the potential for waste requires the director of the film office to "assur[e] a 'one-stop' permit process for application for permission to use state-owned property for motion pictures."<sup>376</sup> This provision was not directed at the cities and counties of California but at various departments and agencies of state government.

## 5. Fees

This section proposes limits on production fees for the use of the jurisdiction's services: "A suggested fee schedule for motion picture permits which is reasonably related to the cost of providing services occasioned by motion picture production, including administrative, police, fire, sanitation, and other necessary services."<sup>377</sup> Fees vary tremendously across the country and within each state. New York City leads the country in film friendliness in this regard because it charges no fees for any of its services.<sup>378</sup> On the other hand, Santa Monica, California, charges \$2500

373. See O.C. PERMIT GUIDE, *supra* note 172, at 8.

374. See *supra* Part III.

375. See Hofler, *supra* note 356, at 1.

376. CAL. GOV'T CODE § 14998.8(b) (West 1992).

377. *Id.* § 14999.20(e).

378. Lowry, *supra* note 6, at 5.

per day for filming on the beach,<sup>379</sup> and the Pike Place Market in Seattle charges \$2000 per day for major motion pictures and \$200 per hour, not to exceed \$1000 per day, for other productions.<sup>380</sup>

The suggestion that a fee schedule be developed in this provision covers three broad categories of film location expenses: "(i) the cost of issuing the permit; (ii) the cost of using jurisdiction locations; and (iii) the cost of using fire and police at the location."<sup>381</sup>

#### a. Cost of Issuing the Permit

The cost of issuing permits remains one of the more controversial aspects involved in creating a positive economic environment. Some jurisdictions operate on the basis that the application fee for the permit is a revenue source for the jurisdiction. This approach is inconsistent with the goal of encouraging production. The "no permit" claims of Texas, Michigan, and other states do not necessarily mean that no request for permission to use public property is needed, but rather that there are no administrative expenses associated with the request for help.<sup>382</sup> Cities like Orange, Orlando, San Jose, and New York do not charge permit fees, thereby eliminating one of the few obstacles to production that is completely within the control of the jurisdiction. California's competitors use the fees as part of their marketing tools. "While most California jurisdictions have a costly and time consuming permitting process . . . the few Virginia localities that do require permits offer them for free or at nominal fees with little red tape."<sup>383</sup>

For jurisdictions that remain uncomfortable with the concept of providing the service of reviewing the application for free, reasonable fees may be charged to reflect the costs of the application review.<sup>384</sup> As revenue producers, however, these fees may not find the same legal support.

[L]icensing fees are justified only as a method of financing valid licensing schemes. Public officials imposing fees must establish

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379. Hofler, *supra* note 356, at 1.

380. FILM SEATTLE, *supra* note 331, at 8. Pike Place Market is governed by the Seattle Public Development Authority rather than the City of Seattle.

381. O.C. PERMIT GUIDE, *supra* note 172, at 13.

382. See, e.g., TEXAS PRODUCTION MANUAL, *supra* note 170, at 284; Claire Hinsberg, *Flick Money: Owners Dave Baker and Ken Guertin of Make Believe Productions Close in on Their First Feature Film*, CORPORATE DETROIT MAG., Oct. 1995, at 18.

383. THE VIRGINIA FILM OFFICE, MARKETING BROCHURE 2 (Dec. 1995).

384. *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941) (holding that a city can require the purchase of permits to defray costs of use of streets).

a definite link between the payment required and the actual costs of the licensing or regulatory process. Courts will not presume a link in the absence of evidence. Nor have courts always accepted proffered evidence at face value.<sup>385</sup>

Because filmmaking is a form of speech, all regulations that impose restrictions must be within the context of reasonable time, place, and manner restrictions, including costs. The types of content-neutral burdens allowed under *O'Brien* will apply not only to the location and rules of the permit, but to the fees imposed and the insurance required.<sup>386</sup> Permissible fees are those designed to defray the costs of reviewing and issuing the permit. California has codified this requirement in the UFPA. Section 14999.35 of the California Government Code specifically prohibits charging any amount greater than the actual cost of issuing the permit.<sup>387</sup> Although this statutory section may be even more restrictive than the general constitutional requirement, it provides explicit guidance for the cities and counties of California. The legislative restriction provides sound advice for all jurisdictions. The permit fee should reflect the modest cost of reviewing the permit and should not be used as a revenue source.

California follows its own fee requirements. The Model Permit Code provides that the California Film Commission "may establish fees not to exceed the actual cost of the affected state agency for this purpose [of making commercial motion pictures]."<sup>388</sup> However, the Film Commission does not exercise this power, electing not to charge for its services.<sup>389</sup>

Unfortunately, the legal requirement that fees not exceed the jurisdiction's actual cost provides no practical benchmark for establishing reasonable fees. In trying to offer guidance on the reasonable range of fees for its local area, the Orange County Film Commission suggested that "[f]ees ranging up to \$200 or \$300 for feature films are generally considered within this reasonable range, and an hourly fee with a reasonable cap will also serve in this regard. Fees for still photography and

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385. Patricia D. Gugin, Note, *Conditioning Access to the Public Forum on the Purchase of Insurance*, 17 GA. L. REV. 815, 826 (1983) (citing *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981); *International Soc'y for Krishna Consciousness, Inc. v. Lentini*, 461 F. Supp. 49, 53 (E.D. La. 1978); *Moffett v. Killian*, 360 F. Supp. 228 (D. Conn. 1973) (internal footnotes omitted)).

386. Gugin, *supra* note 385, at 836-38.

387. CAL. GOV'T CODE § 14999.35 (West 1992) ("No fee which is greater than the actual cost incurred shall be charged by any county, city, city and county, or special district for film production which occurs entirely on private property.").

388. *Id.* § 14998.8(a).

389. CALIFORNIA FILM COMMISSION AND PUBLIC AFFAIRS COALITION OF AMPTP, THE 30-MILE ZONE CHART, Jan. 1995, at 8 [hereinafter AMPTP].

reasonably reflect the costs of issuing the permit, and waivers of such fees must be limited to non-viewpoint based criteria. Exempting or reducing fees for classes of filmmakers, such as all tax-exempt organizations, discriminating between still and 35mm photographers based on the impact of the permit's overhead, and offering volume discounts would all be content-neutral criteria that the permitting agent could use in exercising discretion.

#### b. Cost of Using the Location

Unlike permit fees, the cost to rent public property for film use is neither regulated by the UFPA nor significantly limited by constitutional constraints. Instead, general rules of reasonableness apply. Here, market forces will determine the cost of property rental with the amounts ranging from zero to thousands of dollars per day. Prices may also be determined, in part, with reference to the scope of the production, the rates charged for other activities, and the availability of the property.

Given all these factors, the only limitation is that the rate be reasonably related to the use of the public property. Although, the definition of a reasonable rate is difficult to establish, arbitrary amounts intended to discourage use or costs that are far above the property's rental rate for other uses cannot be supported and have the effect of undermining improvements in the film permitting process.<sup>396</sup>

#### c. Cost of Public Safety Personnel

The expense incurred to have the fire department, police, or sheriff present to supervise and provide public safety support for filming is generally a function of the existing cost for staffing the respective departments.<sup>397</sup> The policies of each jurisdiction vary considerably. A survey conducted by the Association of Film Commissions International ("AFCI") found that the average cost for hiring a fire safety officer ranges from \$18 to \$25 per hour; expensive jurisdictions have rates as high as

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fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit . . . . The costs to which petitioner refers are those associated with the public's reaction to the speech. Listeners' reaction to speech is not a content-neutral basis for regulation.

*Id.*

396. See, e.g., Gugin, *supra* note 385.

397. O'Kane, *supra* note 208, at 18.



multimedia should reflect a lower fee scale.”<sup>390</sup> In contrast, only four of the seventeen respondents to Pittsburgh’s informal survey on filming requirements charge more than \$75.<sup>391</sup> The difference between the two results may be that \$200 to \$300 begins to estimate the costs to the jurisdiction for review of an occasional permit, while fees ranging from free to \$75 reflect a nominal expense that creates no imposition on the production companies.<sup>392</sup> For jurisdictions trying to encourage filming, rather than merely fulfill their obligation to respond to requests, the \$0 to \$75 fee will send production companies a positive message of support. At \$200, the fee is neither prohibitive nor encouraging. As the fee dramatically increases, it becomes a significant obstacle to production in both the marketing and free speech arenas.

In determining the scope of a reasonable fee, content issues must not be taken into account. A permit ordinance will violate the First Amendment if it allows the permitting agent to impose fees for projects that promote a certain viewpoint.<sup>393</sup> The result will be the same if the fees are capped or statutorily set. The ordinance will be unconstitutional where the criterion to waive or reduce fees is based upon content.<sup>394</sup> Making the fees contingent upon the magnitude of the burden imposed on the jurisdiction is acceptable unless they are based on expenses caused by the popularity or unpopularity of the speaker or the message.<sup>395</sup> Fees must

390. O.C. PERMIT GUIDE, *supra* note 172, at 13.

391. PITTSBURGH FILM OFFICE, ECONOMIC IMPACT QUESTIONNAIRE (1995).

392. California also strongly discourages any requirement that production companies have a business license. For a business license requirement to be legal, the jurisdiction must comply with section 37101(b) of the California Government Code. CAL. GOV’T CODE § 37101(b) (West 1992 & Supp. 1993). The statute requires that the business license fee levied on any business that operates “both within and outside the legislative body’s taxing jurisdiction, shall levy the tax so that the measure of tax fairly reflects that proportion of the taxed activity actually carried on within the taxing jurisdiction.” *Id.* Jurisdictions may not find the requirement of proportionality worth the effort. In addition, section 16000 of the California Business and Professional Code has a similar limitation. CAL. BUS. & PROF. CODE § 16000 (West 1987). The required apportionment will require significant administrative work for the jurisdiction and will typically result in a very small value generated from the license. Jurisdictions would do well by heeding the legislature’s advice to forego business license fees.

393. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

394. *Id.*

395. *Id.* at 134. This disparity in fees is sometimes referred to as the heckler’s veto. As the Court explained the problem:

The county envisions that the administrator, in appropriate instances, will assess a fee to cover “the cost of necessary and reasonable protection of persons participating in or observing said . . . activit[y].” In order to assess accurately the cost of security for parade participants, the administrator “must necessarily examine the content of the message that is conveyed,” . . . estimate the response of others to that content, and judge the number of police necessary to meet that response. The

\$100 per hour.<sup>398</sup> The Los Angeles Fire Department lists standard rates of approximately \$29 per hour with an eight-hour minimum.<sup>399</sup> The AFCI reports approximately 30% of the jurisdictions are above this cost, in the \$30 to \$55 range.<sup>400</sup> If the cost is paid to the jurisdiction directly rather than to the officer, the expense will be designed to reflect the actual cost to provide the officer, including both the salary and benefits. Benefit costs will vary considerably by state and locale. The Orange County Film Commission suggests a range from "30% to 35% of the salary, so that a city should be reimbursed for the 135% of the salary of a police officer when that on-duty officer is assigned to work on location."<sup>401</sup>

Police salaries are similar to those of the fire departments. The AFCI reports the average cost per hour for police is between \$18 and \$22, and for those charging an additional 25% the rates range from \$24 to \$30 per hour.<sup>402</sup> The Los Angeles County Sheriff's Department, which serves many Los Angeles area cities, undermines the goal of Hollywood competitiveness by charging approximately \$53 per hour with a four-hour minimum, insurance, mileage, and time-and-one-half after eight hours.<sup>403</sup>

Constitutional mandate, statute, and sound business practice each suggest that all jurisdictions should charge reasonable fees. In determining the reasonableness of fees, it may be inappropriate to compare the rates from different states given the various costs to operate in those jurisdictions. Nonetheless, production companies are strongly encouraged by the open, competitive market for film locations to examine their options. Jurisdictions in the upper half of the cost surveys may wish to reassess their definition of reasonableness and commitment to film friendliness.

## 6. The Application Form

The final requirement of the UFPA is for the jurisdiction to consider a uniform permit application form that includes the following provisions:<sup>404</sup>

- a. The name, address, and telephone number of the applicant or duly authorized representative, and, if available, of the director, first assistant director, unit production manager, or location manager.

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398. *Id.*

399. AMPTP, *supra* note 389.

400. O'Kane, *supra* note 208, at 18.

401. O.C. PERMIT GUIDE, *supra* note 172, at 14.

402. O'Kane, *supra* note 208, at 18, 20.

403. AMPTP, *supra* note 389.

404. CAL. GOV'T CODE § 14999.20(f) (West 1992).

- b. The name and address of the individual or production company to whom the permit is to be issued.
- c. The type of the production or project.
- d. The date(s), time(s), and location(s) (including preparation and striking days).
- e. A brief description of the proposed filming activity, including any other activity which would affect the use of public facilities in the area.
- f. An estimate of the number of individuals in cast and crew.
- g. An estimate of the types and number of vehicles.
- h. If an applicant intends to use either wild animals, chemicals, explosives or fire, or intends to engage in any other hazardous activity, a statement to that effect.
- i. Any additional information the county, city, or city and county deems necessary.<sup>405</sup>

The suggested permit information is simple and clear, reflecting the typical permit for most cities and states that require them. Few changes would be needed to tailor the application to any jurisdiction. Some additional information may be appropriate depending on the nature of the jurisdiction (e.g., if the jurisdiction has lakes, coastal areas, or environmentally sensitive locations).<sup>406</sup>

The purpose of the permit application is to lay the basis of the agreement between the production company and the jurisdiction.

The permit represents the understanding between the production company and the jurisdiction regarding the use of the local resources. Essentially, the permit requires the production company to guarantee that it will operate in a reasonable and safe manner, refrain from unduly disrupting the community, indemnify the jurisdiction from liability, carry insurance, and act in coordination with any necessary city or county departments such as fire, police, traffic, harbor patrol or lifeguards.<sup>407</sup>

Generally, cities and counties also require a statement acknowledging the obligation to indemnify the jurisdiction,<sup>408</sup> proof of insurance,<sup>409</sup> and

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405. *Id.* § 14999.32. Subsection (i) should be construed to mean those items that are not listed above, but that properly fall within the jurisdiction's policing authority, such as those items suggested in subsections (a) through (h). It does not give the permitting agent unfettered power to request additional information from all or from a selected group of applicants.

406. *See, e.g.,* CHICAGO FILM OFFICE, PROCEDURES FOR FILMING.

407. O.C. PERMIT GUIDE, *supra* note 172, at 7.

408. The California Film Commission incorporates the following indemnification provision:

evidence that the jurisdiction has been named as an additional insured.<sup>410</sup> Accordingly, the application should require an acknowledgment of these requirements. The permit application should also serve as the basis for the working relationship between the jurisdiction and production company by providing the information necessary to facilitate production. Information providing the contact person with the city, police, fire, or other department requirements should be specified either in the permit or in an accompanying cover letter. These requirements should be provided in a simple, reliable, and accurate manner to the production company.<sup>411</sup>

The permit may also be used to collect useful information for the jurisdiction. The permit, or a survey/rider attached thereto, can be used to collect data exploring the impact of the jurisdiction's marketing services and tracking economic impact of the production. Simple questions for marketing purposes may include such questions as where the production company found the commission's telephone number, or whether it took advantage of a local library. Questions pertaining to economic information may include the number of the cast and crew members housed in local hotels or the number of those who were hired locally.<sup>412</sup> An estimate of local expenditures may be helpful, but the value of such information is limited. Other techniques that track the spending and activities during the filming, or shortly thereafter, may better reflect the actual spending and hiring practices.<sup>413</sup> Nonetheless, the optional economic and marketing

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Permittee waives all claims against City/County, its officers, agents and employees, for loss or damage caused by, arising out of or in any way connected with the exercise of this permit and permittee agrees to save harmless, indemnify and defend City/County, its officers, agents and employees, from any and all loss, damage or liability which may be suffered or incurred by City/County, its officers, agents and employees caused by, arising out of or in any way connected with exercise by permittee of the rights hereby permitted, except those arising out of the sole negligence of City/County.

CALIFORNIA GUIDEBOOK, *supra* note 71, at 26.

409. *E.g.*, NEWPORT BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.46, § 80 (1968); CHICAGO FILM OFFICE, PROCEDURES FOR FILMING; CALIFORNIA GUIDEBOOK, *supra* note 71.

410. *E.g.*, KERN COUNTY, ORDINANCE CODE ch. 12.12, § 30(c) (1993); CHICAGO FILM OFFICE, PROCEDURES FOR FILMING; CALIFORNIA GUIDEBOOK, *supra* note 71; ORANGE COUNTY FILM COMMISSION, MODEL FILM PERMIT.

411. *E.g.*, FILM SEATTLE, *supra* note 331; SAN DIEGO FILM GUIDE, *supra* note 363, at 4; CHICAGO FILM OFFICE, PROCEDURES FOR FILMING.

412. In Tennessee, for example, the Memphis & Shelby County Film & Music Commission "Film Location Agreement" asks the production company to estimate the "dollars left in Memphis/Shelby County area," the number of local crew, and the number of shooting days. MEMPHIS & SHELBY COUNTY FILM & MUSIC COMMISSION, FILM LOCATION AGREEMENT 2 (1994).

413. See MONITOR REPORT, *supra* note 28, Appendix A-1.

information may be useful, particularly for the small film office, in refining the marketing tools and better assessing the local impact of production.

Distinct from the filming permit, some jurisdictions require a separate permit for the use of special effects and explosives.<sup>414</sup> In California, for example, state law both defines the pyrotechnic special effects<sup>415</sup> and requires that a permit be issued before any pyrotechnic effect can be used.<sup>416</sup> The Orlando guide to filming provides a simple introduction to these requirements:

The Metro Orlando area wants you to get fired up about working here, but regulations do exist. Special-effects coordinators who plan to use explosives or fireworks—such as squibs, black powder charges and air mortars—must satisfy several requirements:

- A pyrotechnic permit must be obtained. The permit requires a detailed explanation of the explosion and what substances are needed for the effect.
- Special-effects explosions, whether audible or visible, large or small, must be carried out by a certified special-effects technician. A certificate must be attached to the permit.
- A certificate of insurance naming the city/county additionally insured for \$5 million must accompany the permit.<sup>417</sup>

The use of a separate permit for pyrotechnics provides jurisdictions with a more specific regulation regarding the potentially hazardous activity and describes those productions that require fire review for pyrotechnics and those that do not.

### *B. Additional Ordinance Requirements*

Each of the six broad areas covered by the UFPA outlines an important component of a comprehensive local or regional ordinance. To work effectively, additional provisions are necessary to clarify certain issues and to avoid some problems that would otherwise grow out of the UFPA. Through a review of the Model Ordinance and the ordinances used

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414. FIRE PROTECTION HANDBOOK, *supra* note 207, at 4.

415. CAL. HEALTH & SAFETY CODE § 12532 (West 1991).

416. *Id.* § 12578; *see also* FIRE PROTECTION HANDBOOK, *supra* note 207, at 4.

417. METRO ORLANDO FILM AND TELEVISION OFFICE, ORLANDO FILMBOOK, *supra* note 360, at 29.

by cities such as Phoenix and Newport Beach, a clearer understanding of the practical needs can be found.

### 1. Enabling Clause

Although not mentioned specifically in the UFPA, an essential requirement of every film ordinance is an enabling clause or a statement of authority specifying that a permit is required for filming. The film ordinance of Newport Beach provides that “[n]o person shall use any public property or facility for the purpose of taking still, motion, or television pictures without first applying for and receiving a permit therefor from the City Manager, or his or her authorized representative.”<sup>418</sup> Without this clause, the entire permit process may be deemed voluntary. Jurisdictions without permit requirements may instead regulate specific acts, such as pyrotechnics or road closures, without ever regulating the filming itself. In this way, many states and jurisdictions can fulfill their public safety obligation without having a film permit ordinance. Nonetheless, if a jurisdiction wishes to regulate filming, this is a good example of the language needed in the introductory provisions of the ordinance.

### 2. Scope of Authority on Private Property

The language used in the enabling paragraph will determine the reach of the jurisdiction’s authority in regulating filming activities. For example, the Model Ordinance extends to “any public or private property, facility or residence.”<sup>419</sup> Such a clause extends the permit authority past the public roads, parks, and buildings and into the backyard of every residence in the community. Long Beach, California, which recently adopted the Model Ordinance as its local ordinance, amended this provision to eliminate the regulation of private property.<sup>420</sup> The rationale suggested by the Film Commission is that the permits allow better tracking of production and assessment of economic impact. “The California Film Commission suggests that no fees be charged to encourage compliance and reduce any concerns regarding a public fear of overreaching public authority.”<sup>421</sup> The

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418. NEWPORT BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.46, § 10 (1968).

419. CALIFORNIA MODEL FILM ORDINANCE § II(A).

420. LONG BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.61, § 20 (1994) (“No person shall use any city street, alley, sidewalk, park, pier, way or other public property owned or controlled by the city for purpose of taking commercial motion pictures or television pictures or commercial still photography without first applying for and receiving a permit . . .”).

421. O.C. PERMIT GUIDE, *supra* note 172, at 22.

highly regulated and planned community of Irvine, California, has adopted the Film Commission approach, requiring a permit but waiving all fees. The surrounding communities of Laguna Beach, Long Beach, and Newport Beach have all limited the permit requirements to public property.<sup>422</sup> The power to regulate filming on private property is not necessarily within the jurisdiction's hands. Where the permit allows for a waiver of existing laws, such as parking restrictions, the absence of a permit will subject the filmmaker to the posted parking requirements. Pyrotechnics necessarily require compliance with the applicable state statute for both licensing and use. When no variance is required, however, troubling questions are raised involving both the rights of speech and the rights of privacy. Since a question of this type has never been litigated, the applicable standard for review of the ordinance is unclear. Conceivably, a requirement that permission be sought for filming on private property, would be a form of prior restraint subject to strict scrutiny under *Near v. Minnesota*.<sup>423</sup> The legitimate concerns of fire hazards, neighborhood disruption, and parking restrictions are already covered by other city and state laws; therefore, the government's compelling interest is even further reduced.

Even if the film permit requirement is not a form of prior restraint or deemed a content-based restriction, the *O'Brien* standard that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" must still be satisfied.<sup>424</sup> The subsequent gloss on this requirement that the regulation promotes "a substantial government interest which would be achieved less effectively absent the regulation"<sup>425</sup> may not be sufficient to uphold the regulation since the non-speech activities which are subject to regulation are already effectively regulated.

As many cities have indicated, the incidental benefits of mandatory permits for private property may not outweigh the problems associated with such regulation.<sup>426</sup> An alternative is to require permits when pyrotechnics, parking variances, or other modifications of the existing

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422. *Id.*; see also LONG BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.61, § 20 (1994); LAGUNA BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.66, § 10 (1978); NEWPORT BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.46, § 10 (1968).

423. 283 U.S. 697, 697-99 (1931).

424. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

425. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

426. See, e.g., LONG BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.61, § 20 (1994).

regulatory scheme are necessary.<sup>427</sup> In this way, local concerns can be addressed but privacy and free speech will not be hampered.

### 3. Scope of Authority for Exempted Speech

In addition to the physical scope granted by the statement of authority, the broad language used in the enabling clause also includes certain activities that the jurisdiction may choose not to regulate. As a result, these activities should be exempted from the permit requirements and the filming regulation. For example, personal videotaping and private family filming may need to be carved out of the broad regulatory scope.<sup>428</sup>

Another typical exemption is allowing the news media to film an on-the-spot reporting of current events and similar activities.<sup>429</sup> Theoretically, such an exemption should not be necessary because the First Amendment already protects filming; the ordinance must be a reasonable restriction on conduct incidental to the content of the speech.<sup>430</sup> However, the practical differences between planned commercial filming and on-the-spot news reporting require different regulatory schemes. A regulation that is otherwise constitutional will not remain so if the regulation provides inadequate alternatives.<sup>431</sup> The regulations that allow for reasonable restrictions on commercial filmmaking may be unduly burdensome on news gathering because of the delays created during permit processing. "While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, . . . a

427. ORANGE COUNTY FILM COMMISSION, MODEL MUNICIPAL FILM ORDINANCE (1996). The ordinance was endorsed by the Orange County Board of Supervisors on October 8, 1996. See *infra* Appendix.

428. CALIFORNIA MODEL FILM ORDINANCE § II(A)(2) ("Exemptions: . . . The filming or video taping of motion pictures solely for private-family use."); LONG BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.61, § 20 (1994); NEWPORT BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.46, § 20 (1968) (exempts "amateur photographers" as part of a broader exemption). Interestingly, the Phoenix film ordinance has no exemption for amateur or private use. PHOENIX, ARIZ., CITY CODE art. 8, § 10-60 (1974).

429. LONG BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.61, § 20 (1994); PHOENIX, ARIZ., CITY CODE art. 8, § 10-60 (1974); NEWPORT BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.46, § 20 (1968).

Exemptions: . . . News Media: The provisions of this Chapter shall not apply to or affect reporters, photographers or cameramen in the employ of a newspaper, news service, or similar entity engaged in on-the-spot broadcasting of news events concerning those persons, scenes or occurrences which are in the news and of general public interest.

CALIFORNIA MODEL FILM ORDINANCE § II(A)(2).

430. *O'Brien*, 391 U.S. at 377.

431. *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981).



restriction on expressive activity may be invalid if the remaining modes of communication are inadequate."<sup>432</sup> Thus, requiring a filming permit before a reporter can cover a story would be deemed an inadequate alternative by most journalists and presumably by most courts.

The permit requirement creates two distinct burdens for news crews. First, a permit application would take more time than is available to cover the breaking news. Second, the exact location for the filming must be specified in the permit. By excluding news gathering and related activities from the permit requirements, the jurisdictions protect the ordinance from attack while limiting the breadth of the open provision.

Also unclear is the status of a documentary filmmaker, who sometimes faces similar burdens as that of a news crew but is excluded from the definition of news media under the Model Ordinance. For some aspects of documentary films, both the time and location issues that handicap news gathering would also hamper documentary filmmaking. Some documentary filming may entail spontaneous events that make applying for a film permit virtually impossible. For other aspects, the timing of the filming may be planned well in advance, but the locations may not be determined. In these situations, the documentary filmmaker is no different than the news crew, although the turnaround time for public viewing may differ. Arguably, the similarities between documentary filming and news coverage should bring the documentary film company within the penumbra created by the "similar entity" caveat and, when appropriate, allow it to be treated as a news crew under the definition. However, the status remains unclear. A simple remedy for these concerns is to provide for an express exemption that waives the permit requirement for spontaneous, actual events.

A third exemption is provided for "Charitable Films: Projects which qualify under Section 501(c)(3) of the Internal Revenue Code."<sup>433</sup> For example, Phoenix exempts the permit fees, but still requires a permit for such organizations.<sup>434</sup> This exemption may have been based on the assumption that the productions were small and therefore needed no regulation. Fee waivers are based on the principle that the jurisdiction should not be generating revenue from charitable activities. The fee waivers are another tax exemption for these qualifying organizations.

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432. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (citations omitted).

433. CALIFORNIA MODEL FILM ORDINANCE § II(A)(3); LONG BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.61, § 20 (1994).

434. PHOENIX, ARIZ., CITY CODE art. 8, § 10-60 (1974).

The provision also has the practical effect of allowing film students to work without permits. While some student films become as large as small commercial projects, the exemption may still have continuing validity.<sup>435</sup> Since road closures, pyrotechnics and other activities are separately governed, a mandatory permit may not serve any compelling jurisdictional interest while creating a significant logistical impediment to the school's film and photography activities.

#### 4. Empowerment Provisions for Regulation and Film Liaisons

Often, a significant discrepancy exists between the written ordinance and the practice of permitting. Jurisdictions will not commit themselves to issuing every permit in twenty-four hours, because of the possible complications such a deadline would entail. Newport Beach, for example, prides itself on same-day permitting and next-day filming for most projects but requires that the permit be requested "not less than fourteen (14) days before the date on which such person desires" to film.<sup>436</sup> Newport Beach resolves this inconsistency by empowering the city manager to have the discretion to waive the advance requirement when appropriate.<sup>437</sup> Such discretion must be carefully constrained, however, to be constitutionally permitted.<sup>438</sup> In *Forsyth County v. Nationalist Movement*, the discretion to reduce or waive permit fees was struck down by the Supreme Court because it did not provide "narrowly drawn, reasonable and definite standards," . . . guiding the hand of the Forsyth County Administrator."<sup>439</sup>

The decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law

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435. See O.C. PERMIT GUIDE, *supra* note 172, at 22.

[S]ome graduate film work presents a scope of production comparable to any feature film. An alternative may be to exempt school projects other than those filmed with 35mm film, typically the type of film stock necessary for the work to be viewed as of "professional quality." Another alternative would require permitting for all student films, but waive all fees.

*Id.*

436. NEWPORT BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.46, § 30 (1968).

437. *Id.*

438. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769 (1988).

439. 505 U.S. 123, 133 (1992) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)).

or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees.<sup>440</sup>

To overcome this problem, Newport Beach should develop criteria for the city manager that establish standards providing that the permit will be issued with less than fourteen days advance notice whenever the shorter time allotted will not interfere with the public safety and the time available is sufficient to review the application. This alternative would narrow the focus and standardize the policy as applied by Newport Beach.<sup>441</sup>

In addition to the power to waive certain requirements of the ordinance, the city manager or other designated permitting agent needs the power to develop the rules and regulations necessary to implement the ordinance. The Long Beach ordinance has included a well-drafted provision to address this issue:

Rules: the city manager or designee is authorized and directed to promulgate rule and regulation, subject to approval by resolution of the council, governing the form, time and location of any film activity set forth within the city. He/she shall also provide for the issuance of permits. The rules and regulation shall be based upon the following criteria:

1. The health and safety of all persons;
2. Avoidance of undue disruption of all person within the affected area;
3. The safety of property within the city; and
4. Traffic congestion at particular locations within the city.<sup>442</sup>

The Long Beach provision gives appropriate authority to the permitting agent while limiting the discretion to areas of reasonable concern for the jurisdiction, thereby creating the necessary structure and restrictions.<sup>443</sup>

The regulations may include limits on noise, nighttime film production, traffic impact during popular tourist periods, the use of animals, and other issues related to public safety and welfare. The unfettered discretion that

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440. *Id.*

441. While the Court discusses the inconsistent application of the discretion as part of its rationale, the facial challenge to the validity of the permit and proper exercise of discretion would not have changed the outcome. As the Court explained: "[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Id.* at 133, n.10; *see also* *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

442. LONG BEACH, CAL., MUNICIPAL ORDINANCE ch. 5.61, § 50 (1994).

443. *See Forsyth County*, 505 U.S. at 132–33; *Lakewood*, 486 U.S. at 769.

would invalidate such a grant of authority is eliminated by setting out the appropriate criteria for creating regulations, granting permits, and allowing waivers of the ordinance.

By utilizing the six key provisions required under the UFPA and adding provisions that set forth the role of the film permit ordinance and provide reasonable discretion to the permitting agent, a jurisdiction can draft an ordinance that will promote both the health and safety of the jurisdiction and the economic interests of its community. Attached to this Article in the Appendix is the Orange County Model Municipal Film Ordinance, which effectively incorporates most of these eight requirements.<sup>444</sup>

## V. CONCLUSION

Use of carefully drafted ordinances will provide an important first step in the battle for local film and entertainment production. Streamlined application procedures, effective coordination both between and within jurisdictions, and reasonable requirements allowing for quick responses will allow the community to participate in this explosive growth industry.

As the economic importance of media content continues to grow, and the ability to deliver motion pictures and visual images to the home and office continues to expand, the battle over local film production will continue. Film production provides tremendous local revenue through spending in hotels, restaurants, and retail shops. The indirect economic impact reaches even farther, employing local residents, promoting tourism, and feeding the technological growth in new industries and media. The entertainment industry also adds to the cultural and historical importance of the community. The economic war for revenue-generating feature films will only increase in the years ahead. The multibillion dollar industry represented by local production will spread to every community that works to encourage local economic growth.

By waiving the permit fees, local jurisdictions eliminate one of the few barriers completely in their control and send a message of support to the industry. Following Miami's model, which promotes the community while consolidating regulation further, reduces the overhead for producers and opens their eyes to the opportunities in the area.

The film permit ordinance is the battle plan that sets out the strategy of the participants. If well-drafted, the ordinance will provide a guarantee to the production companies that they will be treated fairly and efficiently.

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444. See *supra* note 427 and accompanying text.

The nature of the regulation is governed by both the economic concerns of the industry and the concerns of regulating the industry in a reasonable, unrestrictive manner. As a form of speech, filming is entitled to the same deference as other types of First Amendment activity. Therefore, ordinances that regulate the health and safety of the industry must be drafted carefully and not veer into the regulation of content.

Cities throughout North America can benefit economically and culturally from promoting the industry and bringing some of the growth home. The regulations in these cities are carefully tailored to promote the community, increase economic growth, and unleash the creative vision of the filmmakers.

Increased coordination, alliances between the City and County of Los Angeles, support for neighboring Orange County, and a significant investment in a new major production studio: with all these steps, Hollywood has moved to protect its status as the home of the entertainment industry and has shown a renewed commitment to the industry.

Ultimately, the war for market share in the growing entertainment industry will have no losers. Continued growth will allow every interested community to expand local production and build local pride. All it takes is a camera and a vision. The stage is set.

## APPENDIX

**Orange County Film Commission  
Model Municipal Film Ordinance****FILMING ACTIVITIES**

SECTION 10. DEFINITIONS.

SECTION 20. PERMIT—REQUIRED.

SECTION 30. PERMIT APPLICATION AND REVIEW.

SECTION 40. PERMIT APPLICATION, LOCATION, AND EXPENSE FEES.

SECTION 50. RULES AND REGULATIONS.

SECTION 60. REQUIREMENTS FOR GRANTING APPLICATION.

SECTION 70. GENERAL PERMIT CONDITIONS.

SECTION 80. INSURANCE.

SECTION 90. NOTIFICATION AND APPEALS.

SECTION 10. DEFINITIONS.

A. "Filming" as used in this chapter means and includes all activity attendant to staging or shooting motion pictures, television shows or programs, commercial still photography, video tapes, computer-based programs, or other visual reproduction technology now known or hereafter created. The period of filming includes the set-up, strike and time of photography.

B. "Commercial films" as used in this chapter means and includes all activity attendant to filming any entertainment or advertising programs for any media now known or hereafter created.

C. "Charitable or student films," as used in this chapter, means any filming by a nonprofit organization, which qualifies under Section 501(c)(3) of the Internal Revenue Code as a charitable organization or is an accredited educational institution, and for which no person, directly or indirectly, shall receive a profit from the marketing and production of the film or from showing the films, tapes or photos.

D. "News media," as used in this chapter, means filming for purpose of spontaneous, unplanned television news reporting by journalists, reporters, photographers or camera operators.

E. "Private Property" as used in this chapter, means any property not owned by the city on which filming would not interfere with public rights of way, access or safety.

**SECTION 20. PERMIT—REQUIRED.**

A. No person shall use any city street, alley, sidewalk, park, pier, way or other public property owned or controlled by the city for the purpose of making commercial films without first applying for and receiving a permit from the city manager or his/her designee, provided that the provisions of this chapter shall not apply to or be construed to affect (1) news media and (2) filming solely for private-family use.

B. No person shall use any private property for the purpose of making commercial films without first applying for and receiving a permit from the city manager or his/her designee. Notwithstanding the foregoing, the provisions of this chapter shall not apply to or be construed to affect the following filming on private property:

1. Filming which requires no parking variances and uses no public property or rights of way on public property;
2. Filming which does not impair the quiet enjoyment of the surrounding properties;
3. Filming which does not involve the use of any pyrotechnic device as defined in California Health & Safety Code section 12526;
4. A licensed business which regularly employs a licensed pyrotechnic operator as defined in California Code of Regulations section 981.5;
5. Filming by news media; or
6. Filming solely for private-family use.

**SECTION 30. PERMIT APPLICATION AND REVIEW.**

A. Each application for filming under this chapter must be completed in full and filed with the city manager or his/her designee.

B. Each application must include the following information:

1. The name of the owner or owner's designee, the address and telephone number of the place at which the activity is to be conducted;
2. The specific location at such address or place;
3. The inclusive hours and dates such activity will transpire;
4. A general statement of the character or nature of the proposed filming activity, including a detailed description of any potentially disruptive activities;

5. The name, address and telephone number of the person or persons in charge of such filming activity;
6. The number of personnel to be involved;
7. Use of any animals or pyrotechnics;
8. A list of major equipment to be used, including but not limited to trucks, buses, limousines and cameras; and
9. Such additional information as the city manager or his/her designee may reasonably require.

C. The permit application shall be in a form the city manager or his/her designee may reasonably require. In addition to the foregoing, the applicant may submit the permit application on the form adopted and in use by the Orange County Film Commission.

D. The city manager or his/her designee may refer the application to such appropriate city departments as are directly impacted by the application and as he/she deems necessary from the nature of the application for review, evaluation, investigation and recommendations by the departments regarding approval or disapproval of the application.

E. The city manager or his/her designee shall issue a permit under this chapter if it is determined that the following criteria have been met:

1. The proposed use will not unreasonably interfere with traffic or pedestrian movement, or unreasonably interfere with or endanger the public peace or rights of nearby residents to the quiet, peaceable enjoyment of their property, or otherwise be detrimental to the public peace, health, safety or general welfare;
2. The proposed use will not unduly impede, obstruct or interfere with the operation of emergency vehicles or equipment in or through the permit area, or adversely affect the city's ability to perform municipal functions or furnish city services in the vicinity of the permits area; and
3. The proposed use will not constitute a fire or safety hazard and all proper safety precautions will be taken as is reasonably necessary to protect the public peace, health, safety or general welfare.

F. The city manager or his/her designee shall deny the permit if the conditions of the chapter and all applicable laws and regulations have not been met or if the application contains incomplete or false information.

G. The city manager or his/her designee may immediately revoke a permit which has been granted, if the conditions of the chapter and all applicable laws and regulations are no longer being met, if the information supplied by the applicant becomes false or incomplete, or if any substantial



change in circumstances results in the proposed use becoming detrimental to the public peace, health, safety or general welfare.

#### SECTION 40. PERMIT APPLICATION, LOCATION, AND EXPENSE FEES.

A. An application fee of \$\_\_\_ [\$25.00 to \$125.00] shall be required for formal processing of every application made under this chapter. Payment may be made in person, by check or by credit card if the city currently has the ability to process credit card payments. [If the fee is \$0, begin this paragraph as follows: "No application fee . . ."]

B. No application fee shall be required of charitable or student films or for filming conducted on behalf of the city or any city departments or divisions.

C. No separate business license tax, fee or charge shall be charged for any applicant whose sole business is commercial filming under this chapter.

D. Each permittee filming under this chapter shall pay a location fee of \$\_\_\_ [\$25.00 to \$400.00] for the daily use of any public property for commercial filming permitted under section 20 A. No location fee shall be charged for commercial filming on private property permitted under section 20 B hereof. Preparation and strike days shall be charged at fifty percent of the daily use rate. [If the fee is \$0, begin this paragraph as follows: "No location fee . . ."]

E. Each permittee filming under this chapter shall reimburse the city for all costs incurred by city, the amount of which shall be determined by the city manager or his/her designee, for city personnel or equipment provided to the applicant for the purpose of assisting or providing security or protection to the applicant for activities conducted under the permit.

#### SECTION 50. RULES AND REGULATIONS.

A. In addition to the requirements of this chapter and all other applicable laws, rules and regulations, the city manager or his/her designee shall condition the permit on such terms and conditions regarding the time, place and manner of utilizing the city streets or other public property which are necessary and appropriate under the circumstances.

B. Rules: The city manager or designee is authorized and directed to promulgate rules and regulations, subject to approval by resolution of the council, governing the form, time, and location of any film activity set forth within the city. He/she shall also provide for the issuance of permits. The rules and regulations shall be based upon the following criteria:

1. The health and safety of all persons;

2. Avoidance of undue disruption of all persons within the affected area;
3. The safety of property within the city; and
4. Traffic congestion at particular locations within the city.

C. Upon reasonable notice by the applicant, the city manager or designee shall have the power, upon a showing of good cause, to change the conditions under which the permit has been issued provided established limitations are complied with in all material respects.

#### SECTION 60. REQUIREMENTS FOR GRANTING APPLICATION.

A. Prior to the granting of the application, each applicant shall agree to indemnify, defend and hold the city, its authorized agents, officers, representatives and employees harmless from and against any and all costs, liabilities, penalties, or other expenses, including defense costs and legal fees, resulting from any and all claims or damage of any nature, including any accident, loss or damage to persons or property.

B. Except as provided herein, each applicant must comply with all city, state and federal laws, regulations and ordinances, and must obtain all necessary permits and licenses as a precondition for the commencement of commercial film production hereunder. Thereafter, the permittee shall remain in full compliance with all such city, state and federal laws, regulations and ordinances, permits and licenses throughout the filming.

#### SECTION 70. GENERAL PERMIT CONDITIONS.

Any applicant granted a permit pursuant to this chapter shall comply with all of the following conditions:

A. The permittee will be required to submit a permit request with sufficient advance notice to allow for the appropriate review of the application. If the filming requested interferes with traffic or involves potential public safety hazards, an application may be required to be submitted at least five working days in advance.

B. The permittee is required to obtain the property owner's permission, consent, and/or lease for use of property not owned or controlled by the city.

C. If the permittee must park equipment, trucks, and/or cars in zones that will not permit it, temporary "No Parking" signs must be posted by the city or the city's designee.

D. For filming that would impair traffic flow, the permittee must use law enforcement personnel designated by the city manager or his/her designee, which may include county sheriff, California Highway Patrol or

city law enforcement personnel and comply with all traffic control requirements deemed necessary by the city.

1. The permittee shall furnish and install advance warnings signs and any other traffic control devices in conformance with the Manual of Traffic Controls, State of California, Department of Transportation. All appropriate safety precautions must be taken;

2. Traffic may be restricted to one twelve-foot lane of traffic, and/or stopped intermittently. When necessary circumstances exist, traffic may be rerouted as provided in a detour plan approved by the city. The period of time that traffic may be restricted will be determined by the city, based on location;

3. Traffic shall not be detoured across a double line without prior approval of the appropriate city departmental representative;

4. Unless authorized by the city, the camera cars must be driven in the direction of traffic and must observe all traffic laws;

5. Any emergency road work or construction by city crews and/or private contractors, under permit or contract to the appropriate department, shall have priority over filming activities.

E. When parking in a parking lot, the permittee may be billed according to the current rate schedule established by the city. In order to assure the safety of citizens in the surrounding community, access roads to beaches or other areas, which serve as emergency service roads, must never be blocked without prior approval. No relocation, alteration, or moving of city-owned structures or property will be permitted without prior approval.

F. The permittee shall conduct operations in an orderly fashion with continuous attention to the storage of equipment not in use and the cleanup of trash and debris. The area used shall be cleaned of trash and debris upon completion of filming at the scene and restored to the original condition before leaving the site.

G. The permittee shall be liable for any damage suffered by the city resulting from the granting or use of this permit and, at the election of the city, shall repair the damage or reimburse the city for all expenses related to such damage.

**SECTION 80. INSURANCE.**

A. As a condition of issuance of a permit hereunder, every permittee must procure and maintain in full force and effect during the term of the permit a policy of insurance from an insurance company licensed to do business in California, which policy names the city, its officers, employees and agents as additional insureds and which provides sufficient coverage that the city manager or his/her designee determines to be necessary and adequate under the circumstances. Proof of insurance shall be submitted to the city in advance of the issuance of the permit. The city manager or his/her designee may waive the requirement of insurance if the city manager or his/her designee determines that the intended use does not present any significant exposure to liability for the city, its officers, employees and agents or to public property damage.

B. The permittee shall conform to all applicable federal and state requirements for Workers' Compensation Insurance for all persons operating under a permit.

C. Surety or Bond: To ensure cleanup and restoration of the site, the permittee may be required to post a refundable faithful performance bond, cash surety or other comparable form of guarantee in an amount to be determined by the city manager or his/her designee at the time the application is submitted. Upon completion of filming and inspection of the site by the city, the guarantee may be returned to the applicant.

**SECTION 90. NOTIFICATION AND APPEALS.**

A. The city manager or his/her designee shall act upon the application in a timely fashion and shall approve or disapprove the application in a period of not greater than five (5) days following the filing of the application. The applicant shall be immediately notified of the action of approval, denial or revocation of the permit application or permit issued under this chapter.

1. The notice of denial or revocation shall state the reasons for such action and the appropriate remedy or cure, if applicable.

2. The notification shall be deemed satisfied when the notice is sent by facsimile or telecopier machine to the telephone number listed on the application, or if no number is listed, when notice is placed, postage prepaid in the United States mail addressed to the applicant at the address shown on the permit application.

B. An applicant or permittee aggrieved by the city manager or his/her designee under this chapter shall have the right to appeal to the city

council. The appeal shall be taken within five (5) days after notice has been received by the applicant or permittee. The city council shall act upon the appeal within fifteen (15) days of the filing of the appeal.